Supreme Court, U.S.
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No. 06-446

IN THE

Supreme Court of the United States

JIMMY V. DUNN, *et al.*,
Petitioners,

v.

NITRO DISTRIBUTING, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Missouri

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In applying the Federal Arbitration Act, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (internal quotation omitted).

The question presented is:

Is there a legal presumption that such "clear and unmistakable evidence" exists if an arbitration agreement expressly incorporates nationwide rules, adopted by the American Arbitration Association and similar well-respected arbitration organizations, providing the arbitrator with sole authority to determine the "existence," "scope," and "validity" of the agreement?

LIST OF PARTIES

All parties do not appear in the caption on the cover page. A list of all parties to the proceeding in the Supreme Court of Missouri is as follows:

Appellants*

Jimmy V. Dunn
Jimmy V. Dunn & Associates, Inc.
Billy S. Childers
TNT, Inc. of Charlotte, North Carolina
Thomas (Tim) D. Foley
T&C Foley, Inc.
Harold (Hal) Gooch, Jr.
Gooch Support Systems, Inc.
Gooch Enterprises, Inc.
Parker E. Grabill
Grabill Enterprises, Inc.
Steven S. Woods
G.F.I. International, Inc.
Pro Net Global Association, Inc.
Pro Net Global I, Inc.
Robert A. Blanchard
Global Support Services, Inc.
Don Brindley

Respondents

Nitro Distributing, Inc.
West Palm Convention Services, Inc.

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* All appellants below are petitioners in this Court with the exception of Jimmy V. Dunn & Associates, Inc.; G.F.I. International, Inc.; Grabill Enterprises, Inc.; and T&C Foley, Inc.

RULE 29.6 STATEMENT

Petitioner Pro Net Global I, Inc. is a wholly owned subsidiary of petitioner Pro Net Global Association, Inc. No other petitioner has a parent corporation. No publicly held company owns 10 percent or more of any petitioner's stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
RULE 29.6 STATEMENT	iii
TABLE OF AUTHORITIES	viii
INTRODUCTION	1
OPINIONS BELOW	2
JURISDICTION	3
STATUTORY AND ARBITRATION CODE PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
A. Background and Signficance of the Federal Law Question	4
B. The Three Arbitration Agreements	6
C. This Litigation	8
D. The Opinion of the Supreme Court of Missouri	9
REASONS FOR GRANTING THE WRIT	11
I. THE DECISION BELOW CONFLICTS WITH A CLEAR MAJORITY OF CASES APPLYING *FIRST OPTIONS* TO ARBITRATION RULES INCORPORATED BY REFERENCE INTO AN ARBITRATION AGREEMENT	12
II. THIS CASE PRESENTS AN IMPORTANT FEDERAL QUESTION THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT	18

TABLE OF CONTENTS—Continued

Page

A. Review Should be Granted Because This Court Has Never Expressly Applied the *First Options* Standard to Incorporated Arbitration Rules 18

B. Review Should be Granted to Ensure That Arbitration Agreements Are Not Subjected to Discriminatory Enforcement 21

CONCLUSION 23

APPENDIX A
(June 30, 2006 Opinion) 1a

APPENDIX B
(April 15, 2005 Opinion) 19a

APPENDIX C
(September 17, 2003 Opinion and January 22, 2004 Order) 40a

APPENDIX D
(9 U.S.C. §§ 2-4) 44a

APPENDIX E
(Excerpts of petitioners' brief to trial court) 46a

APPENDIX F
(Excerpts of petitioners' brief to trial court) 48a

APPENDIX G
(Excerpts of petitioners' brief to court of appeals) 54a

APPENDIX H
(Excerpts of petitioners' reply brief to court of appeals) 60a

APPENDIX I
(Excerpts of petitioners' brief to supreme court) 64a

TABLE OF CONTENTS—Continued

Page

APPENDIX J
(Pro Net arbitration agreement) 70a

APPENDIX K
(Transition-to-Pro Net arbitration agreement) 79a

APPENDIX L
(Amway distributorship agreement) 83a

APPENDIX M
(Excerpts of Rule 11 of the Amway Rules of Conduct) 84a

APPENDIX N
(Rule R-7 of the AAA Rules) 86a

APPENDIX O
(Rule 11 of the JAMS Rules) 87a

TABLE OF AUTHORITIES

CASES — Page

Alliance Bernstein Investment Research & Management, Inc. v. Schaffran, 445 F.3d 121 (2d Cir. 2006) 14-15

Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995) 4

Apollo Computer v. Berg, 886 F.2d 469 (1st Cir. 1989) 1, 13, 16

AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643 (1986) 18-19

Book Depot Partnership v. American Book Co., No. 3:05-CV-163, 2005 U.S. Dist. LEXIS 33782 (E.D. Tenn. June 24, 2005) 15

Buckeye Check Cashing, Inc. v. Cardegna, 126 S. Ct. 1204 (2006) 18

Contec Corp. v. Remote Solution Co., 398 F.3d 205 (2d Cir. 2005) ..... *passim*

Dean Witter Reynolds v. Byrd, 470 U.S. 213 (1985) 4

Diesselhorst v. Munsey Building, L.L.L.P., No. Civ. AMD 04-3302, 2005 WL 327532 (D. Md. Feb. 9, 2005) 13

Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996) 22

Dunn Industrial Group, Inc. v. City of Sugar Creek, 112 S.W.3d 421 (Mo. banc 2003) 21-22

Edward D. Jones & Co. v. Sorrells, 957 F.2d 509 (7th Cir. 1992) 16

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) ..... *passim*

TABLE OF AUTHORITIES—Continued

	Page
Flandreau Public School District v. G.A. Johnson Construction, Inc., 701 N.W.2d 430 (S.D. 2005)	2, 16
FSC Securities Corp. v. Freel, 14 F.3d 1310 (8th Cir. 1994)	1, 15
Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991)	21
Green Tree Financial Corp. v. Bazzle, 539 U.S. 444 (2003)	20
Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79 (2002)	19-21
James & Jackson, LLC v. Willie Gary, LLC, No. 59-2006, 2006 Del. LEXIS 130 (Del. Mar. 14, 2006)	2, 12, 15
Lovell v. Harris Methodist Health System, No. 3:99CV2809G, 2000 WL 351384 (N.D. Tex. Mar. 10, 2000)	15
Marteck Biosciences Corp. v. Zuccaro, No. Civ. AMD 04-3349, 2004 WL 2980741 (D. Md. Dec. 23, 2004)	13
Microchip Technology, Inc. v. U.S. Philips Corp., 367 F.3d 1350 (Fed. Cir. 2004)	2, 16
Netco, Inc. v. Dunn, 194 S.W.3d 353 (Mo. banc 2006)	10
P & P Industries, Inc. v. Sutter Corp., 179 F.3d 861, 867-68 (10th Cir. 1999)	17
Perry v. Thomas, 482 U.S. 483 (1987)	21
Riley Manufacturing Co. v. Anchor Glass Container Corp., 157 F.3d 775 (10th Cir. 1998)	17

TABLE OF AUTHORITIES—Continued

Page

Shaw Group Inc. v. Triplefine International Corp., 322 F.3d 115 (2d Cir. 2003) 13-14

Southland Corp. v. Keating, 465 U.S. 1 (1984)..... 2

Terminix International Co. v. Palmer Ranch Ltd. Partnership, 432 F.3d 1327 (11th Cir. 2005)..1, 12, 14

STATUTES

Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2000)..... *passim*

28 U.S.C. § 1257 2

OTHER AUTHORITIES

Administrative Office of the U.S. Courts, *Legal Decisions, Legislation & Forces of Nature Influence Federal Court Caseload in FY 2005* (Mar. 14, 2006)..... 5

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TABLE OF AUTHORITIES—Continued

Page

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Hoellering, Michael F., "How to Draft an AAA Arbitration Clause," in *Arbitration & the Law 1991-92, AAA General Counsel's Annual Report* 5

Judicial Arbitration and Mediation Services, Comprehensive Arbitration Rules and Procedures ..... *passim*

Lord, Richard A., *Williston on Contracts* (4th ed. 1999) 21

Reuben, Richard C., First Options, *Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 SMU L. Rev. 819 (2003) 4-5, 20-21

Schuler, Kirk W., *ADR's Biggest Compromise*, 54 Drake L. Rev. 751 (2006) 5

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NITRO DISTRIBUTING, INC., *et al.*,
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On Petition for a Writ of Certiorari to the Supreme Court of Missouri

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PETITION FOR A WRIT OF CERTIORARI

Petitioners hereby petition for a writ of certiorari to review the judgment of the Supreme Court of Missouri, which applied the Federal Arbitration Act to three arbitration agreements. Each agreement expressly incorporated arbitration rules providing for the arbitrator to determine the "existence," "scope," and "validity" of the agreement. Nonetheless, the Supreme Court of Missouri itself resolved all issues regarding the existence, scope, and validity of each agreement.

This result conflicts with decisions by the First, Second, Eighth, and Eleventh Circuit Courts of Appeal. *E.g.*, *Apollo Computer v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989); *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 211 (2d Cir. 2005); *FSC Sec. Corp. v. Freel*, 14 F.3d 1310, 1312-13 (8th Cir. 1994); *Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1333 (11th Cir. 2005). The decision below also conflicts with a decision earlier this year by the Supreme

Court of Delaware adopting the "majority federal view that reference to the [arbitration] rules evidences a clear and unmistakable intent to submit arbitrability issues to an arbitrator." *James & Jackson, LLC v. Willie Gary, LLC*, No. 59-2006, 2006 Del. LEXIS 130, at *9-10 (Del. Mar. 14, 2006).

At the same time, however, the Supreme Court of Missouri's decision is consistent with recent decisions by the Federal Circuit and the Supreme Court of South Dakota which concluded that, even when such arbitration rules are incorporated by reference, "the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *Microchip Tech., Inc. v. U.S. Philips Corp.*, 367 F.3d 1350, 1358 (Fed. Cir. 2004); *see also Flandreau Pub. Sch. Dist. v. G.A. Johnson Constr., Inc.*, 701 N.W.2d 430, 436-37 (S.D. 2005).

OPINIONS BELOW

The opinion of the Supreme Court of Missouri is reported at 194 S.W.3d 339 and reprinted in the appendix at Pet. App. 1a. The opinions of the Missouri Court of Appeals (Pet. App. 19a.) and the trial court (Pet. App. 40a.) are not reported.

JURISDICTION

The Supreme Court of Missouri entered judgment on May 2, 2006, which was modified by its own motion on June 30, 2006. Petitioners filed a timely motion for rehearing that was denied on June 30, 2006. This Court has jurisdiction under 28 U.S.C. § 1257(a). *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 7-8 (1984) ("For us to delay review of a state judicial decision denying enforcement of the contract to arbitrate until the state court litigation has run its course would defeat the core purpose of a contract to arbitrate.").

STATUTORY AND ARBITRATION CODE PROVISIONS INVOLVED

This petition raises issues under the Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2000) ("FAA"). The text of FAA §§ 2-4 is set forth in the appendix at pages 44a-45a. This petition also raises related FAA issues as to the American Arbitration Association Commercial Arbitration Rules ("AAA Rules") and the Judicial Arbitration and Mediation Services Comprehensive Arbitration Rules and Procedures ("JAMS Rules").

AAA Rule R-7(a) provides:

> The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the **existence**, **scope** or **validity** of the arbitration agreement.

(Pet. App. 86a (emphasis added).)

JAMS Rule 11(c) provides:

> Jurisdictional and arbitrability disputes, including disputes over the **existence**, **validity**, interpretation or **scope** of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

(*Id.* at 87a (emphasis added).)

STATEMENT OF THE CASE

This petition asks the Court to settle the important and recurring question of the allocation of authority under the FAA when an arbitration agreement incorporates rules providing that the arbitrator, not the court, should determine the "existence," "scope," and "validity" of the agreement. This Court's guidance is necessary to ensure the uniform treatment of arbitration agreements under the FAA, as well as the

correct application of *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995).

A. Background and Significance of the Federal Law Question

Congress enacted the FAA to overcome longstanding judicial reluctance to enforce arbitration agreements. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270-71 (1995). Therefore, an overriding goal of the FAA is to "rigorously enforce agreements to arbitrate." *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 221 (1985).

Accordingly, the FAA requires that determinations of arbitrability be based on an examination of the agreement itself. As the Court has instructed:

> Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question "who has the primary power to decide arbitrability" turns upon what the parties agreed about *that* matter. Did the parties agree to submit the arbitrability question itself to arbitration?

First Options, 514 U.S. at 943 (citations omitted).

In *First Options*, the Court emphasized that if the agreement to arbitrate is silent on arbitrability, "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *Id.* at 944 (internal quotation omitted). This presumption "reverses" the well-known presumption that doubts concerning the scope of arbitration agreements should be resolved in favor of arbitration. *Id.*

"One common and sensible response to *First Options* by arbitration service providers has been to incorporate language into their rules expressly allocating the arbitrability decision to the arbitrators." Richard C. Reuben, First Options, *Consent to Arbitration, and the Demise of Separability: Re-*

storing Access to Justice for Contracts with Arbitration Provisions, 56 SMU L. Rev. 819, 869 (2003).

"Every year, millions of business contracts provide for mediation and arbitration . . . [and a] large number provide for administration by the [AAA], a public-service, not-for-profit organization offering a broad range of dispute resolution procedures." AAA, *Drafting Dispute Resolution Clauses—A Practical Guide* (1994), *available at* http://www.ilr.cornell.edu/alliance/resources/Guide/drafting_dispres_clauses.html. Indeed, the AAA itself suggests that contracting parties adopt a "broadly worded clause" that provides: "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the [appropriate] rules of the American Arbitration Association." Michael F. Hoellering, "How to Draft an AAA Arbitration Clause," in *Arbitration & the Law 1991-92, AAA General Counsel's Annual Report*, at 167.

As a result, the AAA Rules are widely invoked to compel arbitration. In 2002, for example, 230,258 cases were filed with the AAA, or more than 19,000 a month. Kirk W. Schuler, *ADR's Biggest Compromise*, 54 Drake L. Rev. 751, 778 (2006). Thus, nearly as many cases are filed with the AAA each year as civil cases filed in *all* of the federal district courts. In fiscal year 2005, for example, there were 253,273 federal civil filings. Administrative Office of the U.S. Courts, *Legal Decisions, Legislation & Forces of Nature Influence Federal Court Caseload in FY 2005* (Mar. 14, 2006).

In 1998, the AAA amended its Commercial Arbitration Rules to adopt Rule R-7(a), which provides, in part: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the **existence**, **scope** or **validity** of the arbitration agreement." (Pet. App. 86a (emphasis added).) As the AAA explained at the time: "This section is designed to address the court's holding [in *First Options*] to make explicit in the rules

generally accepted principles of arbitral jurisdiction." AAA, *AAA Revises Commercial Arbitration Rules*, 53-NOV Disp. Resol. J. 4 (1998).

Like the AAA, JAMS "is a well-respected, full-service ADR provider." Barbara Dawson & Michele L. Stevenson, *Getting Help with ADR: A Guide to the Main Players*, Business Law Today (Jan./Feb 2001), *available at* http://www.abanet.org/buslaw/blt/bltjan01dawson.html. The counterpart to AAA Rule R-7(a) is JAMS Rule 11(c), which provides: "Jurisdictional and arbitrability disputes, including disputes over the **existence**, **validity**, interpretation or **scope** of the agreement . . . shall be submitted to and ruled on by the Arbitrator." (Pet. App. 87a (emphasis added).)

B. The Three Arbitration Agreements

Although the Amway Corporation (Amway) is not a party to this case, all parties are related to its multi-level marketing business for the sale of consumer goods.[1] As part of Amway's standard distributorship agreement, there are "Rules of Conduct" that require distributors, if mediation fails, to "submit any remaining claim or dispute arising out of or relating to [their] Amway distributorship . . . to binding arbitration" administered by JAMS.[2] (*Id.* at 83a.)

Instead of directly implicating the sale of Amway products, this case arises from the "tools" and "functions" used by Amway distributors to increase sales of Amway consumer products. Tools are motivational products such as audiotapes,

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[1] Amway is now known as Alticor, Inc. and its subsidiary is Quixtar, Inc.

[2] Under Amway Rule of Conduct 11.5.5, "[w]hen parties agree to arbitrate under the Arbitration Rules, they thereby authorize Endispute, Inc., d/b/a J.A.M.S/Endispute . . . to administer the Arbitration." (Pet. App. 85a.)

videotapes, and literature. Functions are motivational seminars, rallies, and conventions.

In this vernacular, respondents Nitro Distributing, Inc. (Nitro) and West Palm Convention Services, Inc. (West Palm) are tool and function businesses, respectively. Both respondents are owned by non-party Mr. Stewart, they support Mr. Stewart's non-party Amway distributorship, and are part of the "Stewart Organization."[3] The Amway distributorship agreement at issue here was signed by non-party Ken Stewart. (*Id.* at 83a.)

In 1998, petitioner Pro Net Global Association, Inc. (Pro Net) was created to facilitate the sale of tools and organization of functions. Pro Net was founded by Mr. Stewart and petitioners Hal Gooch, Bill Childers, Tim Foley, and Steve Woods. Petitioners Jimmy Dunn and Parker Grabill later joined Pro Net. Each of these individuals has an Amway-related organization similar to the Stewart Organization. Mr. Gooch's organization, for instance, includes his tool business, petitioner Gooch Support Systems, Inc. (Gooch Support), and his functions business, petitioner Gooch Enterprises, Inc. (Gooch Enterprises). Similarly, Mr. Childers's tool business is petitioner TNT, Inc. of Charlotte, North Carolina (TNT).

While Pro Net was being created, Mr. Stewart and his cofounders executed the Transition-to-Pro Net agreement. This agreement provided, *inter alia*, that "[t]he Parties hereby agree to submit . . . to final and binding arbitration with J•A•M•S/ENDISPUTE . . . any and all issues arising out of the transition of the Foley, Gooch, Childers, Stewart and Woods organizations." (*Id.* at 79a.) As explained *supra*, the JAMS Rules give the arbitrator the responsibility to deter-

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[3] An Amway-related "'organization' is a term of art for the conglomeration of an Amway distributorship, its owner(s), and their independent tools and functions businesses." (*Id.* at 3a.)

mine the existence, scope, and validity of an agreement to arbitrate.

Mr. Stewart and his co-founders also adopted an arbitration clause specific to Pro Net. As a result, both the Pro Net application, which Mr. Stewart signed as president of Nitro, and the Pro Net Terms and Conditions provide for AAA arbitration. The Pro Net arbitration clause provides, in pertinent part:

> Any dispute, controversy, or claim arising out of, relating to, or concerning the interpretation or performance of the contract created by acceptance of the Membership Application, or the breach thereof, or any dispute, controversy, or claim between one or more members of the Association or between the Association and any of its members . . . . shall be submitted to and settled by binding arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules in effect at that time . . . .

(*Id.* at 78a.) As explained *supra*, the AAA Rules (like the JAMS Rules) give the arbitrator the responsibility to determine the existence, scope, and validity of an agreement to arbitrate.

C. This Litigation

Notwithstanding Mr. Stewart's execution of three agreements to arbitrate "any" and "all" disputes—the Pro Net agreement, the Transition-to-Pro Net agreement, and the Amway distributorship agreement—his entities Nitro and West Palm filed this action in Missouri state court in December 2001. The central theme of their allegations was that their tool and functions business had been "misappropriate[d]" by petitioners in a "conspiracy" involving the creation and operation of Pro Net. (*Id.* at 3a, 15a.)

Citing the FAA, all petitioners promptly moved to compel arbitration under the three agreements described above.

Before the trial court, petitioners submitted two memoranda of law contending that all defenses to arbitrability should be directed to AAA and/or JAMS arbitrators because the agreements incorporated these arbitration rules. (*Id.* at 46a-47a; 48a-53a.)

On September 17, 2003, the Missouri trial court denied the motion in a letter opinion and short order. (*Id.* at 40a-43a.) The court did not deny that respondents' claims were encompassed by one or more of the arbitration agreements, but denied arbitration because of concerns about certain Amway procedures. (*Id.* at 41a-42a.) The opinion did not address the Pro Net agreement or the Transition-to-Pro Net agreement. (*Id.*)

Petitioners appealed to the Missouri Court of Appeals. In both their opening and reply briefs, petitioners again argued that incorporation of the AAA and JAMS rules delegated determination of arbitrability to the arbitrators. (*Id.* at 54a-59a; 60a-63a.) The court of appeals filed its opinion on April 15, 2005. (*Id.* at 19a.)

The court of appeals observed that, under the FAA, a court, not an arbitrator, "is the one to resolve issues related to the validity of the contract." (*Id.* at 29a (internal quotation omitted).) The court of appeals held that the trial court erred in failing to compel AAA arbitration of all respondents' claims under the Pro Net agreement. (*Id.* at 39a.) In light of this holding, the opinion did not address arbitration pursuant to the other agreements. (*Id.*)

D. The Opinion of the Supreme Court of Missouri

Respondents appealed to the Supreme Court of Missouri. The primary basis of their transfer petition was the procedural question of whether state law required a jury to hear a motion to compel arbitration. Consistent with other courts, the court's opinion, as modified on June 30, 2006, held that such motions should be resolved without a jury. (Pet. App. at 16a-17a.)

In their opening brief, petitioners again argued that the incorporation of AAA and JAMS Rules into the three agreements required that arbitrability issues for each agreement be determined by the respective arbitrator.[4] (*Id.* at 64a-69a.) Instead, the Supreme Court of Missouri stated that a court, not an arbitrator, "must determine whether a valid arbitration agreement exists and, if so, whether the specific dispute falls within the scope of the arbitration agreement." (*Id.* at 4a.) Thus, the court implicitly held that, although clearly incorporated by reference into each agreement,[5] the AAA and JAMS Rules did not provide the arbitrator with authority to determine the "existence," "scope," and "validity" of the agreement.

Beginning with the Amway distributorship agreement, the court held that Nitro and West Palm were not bound by Mr. Stewart's signature and that the arbitration clause did not cover their claims. (*Id.* at 4a-7a.)

Turning to the Transition-to-Pro Net agreement, the court held that neither respondent was bound because Mr. Stewart did not complete the "For" line next to his signature and the language "'any and all issues arising out *of* the transition of the Foley, Gooch, Childers, Stewart and Woods organizations'" was "no evidence that Stewart agreed to submit his 'organization's' claims to arbitration." (*Id.* at 7a-8a.)

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[4] On the same day that the Supreme Court of Missouri decided this case, it also decided the companion case of *Netco, Inc. v. Dunn*, 194 S.W.3d 353 (Mo. banc 2006).

[5] The court noted that the Amway distributorship agreement "requir[ed] Amway distributors to submit any dispute to arbitration through JAMS/Endispute, Inc., an independent arbitration entity" (Pet. App. 2a.); the Pro Net agreement had "a separate arbitration clause in which arbitrations were to be administered by the American Arbitration Association" (*Id.* at 3a.); and the Transition-to-Pro Net agreement "required parties to submit disputes . . . to binding arbitration through JAMS/Endispute." (*Id.*)

Finally, as to the Pro Net agreement, the court held that Nitro was a member because its president, Mr. Stewart, had signed an application. (*Id.* at 11a.) Having so held, however, the court did not leave for the AAA arbitrator the question of the extent to which Nitro was bound under this arbitration clause. (*Id.* at 11a-13a.) Instead, the court summarily determined that the other co-founders (as well as Grabill and Dunn) had joined Pro Net as individuals without their businesses (Gooch Support, Gooch Enterprises, and TNT).[6] (*Id.* at 13a.)

This petition followed.

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari because the decision below conflicts with decisions of a state supreme court and federal circuits (including the circuit in which Missouri is located) holding that incorporation of arbitration rules adopted by the AAA, JAMS, and other well-respected arbitration organizations is clear and unmistakable evidence that the parties agreed that the arbitrator is to decide whether a valid agreement to arbitrate exists.

This Court has not answered the specific question presented. Despite the evident clarity of this Court's holding in *First Options*, the decision below is not the only decision to ignore or reach a contrary understanding of the contracting parties' adoption of arbitration rules when determining the arbitrability of a dispute. Certiorari also is warranted to resolve that conflict.

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[6] For the same reasons, the court held that West Palm did not belong to Pro Net. (*Id.* at 8a-11a.) The court also held that, while Pro Net and its former chief operating officer, petitioner Robert Blanchard, could compel AAA arbitration, the same was not true for Pro Net's wholly owned subsidiary, petitioner Pro Net Global I, Inc.; Pro Net's BSMs supply company, petitioner Global Support Services, Inc. (Global); and Global's president, petitioner Don Brindley. (*Id.* at 13a-14a; 17a-18a.)

This issue of arbitrability has national significance because of the prevalence of arbitration agreements incorporating arbitration rules providing for the arbitrator to determine the "existence," "scope," and "validity" of the agreement. Decisions such as the one below undermine the expectation of uniform treatment of arbitration agreements that is both the purpose of the FAA and the reason that so many contracting parties specifically select AAA or JAMS arbitration.

I. THE DECISION BELOW CONFLICTS WITH A CLEAR MAJORITY OF CASES APPLYING *FIRST OPTIONS* TO ARBITRATION RULES INCORPORATED BY REFERENCE INTO AN ARBITRATION AGREEMENT

The decision below cannot be reconciled with leading decisions handed down last year by the Second and Eleventh Circuit Courts of Appeals finding that incorporation of the AAA Rules satisfies the *First Options* requirement of "clear and unmistakable evidence" regarding the parties intent to arbitrate. *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 211 (2d Cir. 2005); *Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1333 (11th Cir. 2005). Moreover, earlier this year, the Supreme Court of Delaware announced its adoption of the "majority federal view that reference to the AAA rules evidences a clear and unmistakable intent to submit arbitrability issues to an arbitrator." *James & Jackson, LLC v. Willie Gary, LLC*, No. 59-2006, 2006 Del. LEXIS 130, at *9-10 (Del. Mar. 14, 2006).

Thus, contrary to the decision below, the lower courts effectively have created a legal presumption that the FAA's allocation of authority is altered when an arbitration agreement provides for arbitration of all disputes and incorporates rules providing for the arbitrator to determine all issues of "existence," "scope," and "validity." Indeed, the author of a recent article "found only two, unpublished, post-*First*

Options federal decisions that reject the idea of incorporating the clear and unmistakable intent required to submit questions of arbitrability to arbitration." Joseph L. Franco, Comment, *Casually Finding the Clear and Unmistakable: A Re-Evaluation of* First Options *in Light of Recent Lower Court Decisions*, 10 Lewis & Clark L. Rev. 443, 470 (2006).[7]

The basis for this line of authority is a First Circuit case that pre-dates *First Options*, but which involved arbitrability issues regarding an agreement incorporating International Chamber of Commerce (ICC) Rules. *Apollo Computer v. Berg*, 886 F.2d 469 (1st Cir. 1989). The ICC Rules "delegate[d] to the arbitrator decisions about the arbitrability of disputes involving the existence and validity of a *prima facie* agreement to arbitrate." *Id.* at 473. The First Circuit concluded:

> Ordinarily, Apollo would be entitled to have these issues resolved by a court. By contracting to have all disputes resolved according to the Rules of the ICC, however, Apollo agreed to be bound by [the ICC's arbitrability provisions]. These provisions clearly and unmistakably allow the arbitrator to determine her own jurisdiction when, as here, there exists a *prima facie* agreement to arbitrate whose continued existence and validity is being questioned.

Id. (citations omitted).

In a decision applying both *First Options* and *Apollo*, the Second Circuit held that a broadly worded arbitration agreement "clearly and unmistakably evidences the parties' intent to arbitrate questions of arbitrability" when it "provides

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[7] Both of these cases were decided by the same district court judge. *See Diesselhorst v. Munsey Bldg., L.L.L.P.*, No. Civ. AMD 04-3302, 2005 WL 327532, at *4 (D. Md. Feb. 9, 2005); *Marteck Biosciences Corp. v. Zuccaro*, No. Civ. AMD 04-3349, 2004 WL 2980741, at *3 (D. Md. Dec. 23, 2004).

for arbitration to be conducted under the rules of the ICC, which assign the arbitrator initial responsibility to determine issues of arbitrability." *Shaw Group Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 124-25 (2d Cir. 2003).

Last year, in *Contec*, the Second Circuit made clear that *Apollo* and *Shaw* should not be read as limited to agreements incorporating ICC Rules. "We have held that when, as here, parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, the incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator." 398 F.3d at 208. In *Contec*, the court concluded "that as a signatory to a contract containing an arbitration clause and incorporating by reference the AAA Rules, [the party] cannot now disown its agreed-to obligation to arbitrate *all* disputes, including the question of arbitrability." *Id.* at 211.

In another decision last year, the Eleventh Circuit observed that "the parties have agreed that the arbitrator will answer this [arbitrability] question by providing (in all three of the arbitration clauses at issue) that 'arbitration shall be conducted in accordance with the Commercial Arbitration Rules then in force of the [AAA].'" *Terminix*, 432 F.3d at 1332. The court held that "[b]y incorporating the AAA Rules . . . into their agreement, the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid." *Id.*

Additionally, the Second and Eighth Circuits have applied the rules and procedures of the National Association of Securities Dealers (NASD) to reach conclusions analogous to those reached by many federal courts concerning the AAA Rules. Earlier this year, the Second Circuit explained that "[u]nlike the AAA rules in *Contec*, the Code does not clearly and unmistakably provide for all issues of arbitrability to be arbitrated. Nonetheless, . . . we hold that the Code unequivocally provides for the arbitrability dispute at issue in this

case to be decided in arbitration rather than by the courts." *Alliance Bernstein Inv. Research & Mgmt., Inc. v. Schaffran*, 445 F.3d 121, 126 (2d Cir. 2006); *see also FSC Sec. Corp. v. Freel*, 14 F.3d 1310, 1312-13 (8th Cir. 1994).

Similarly, the Missouri Supreme Court's refusal to recognize the incorporation of AAA Rule R-7(a) and JAMS Rule 11(c) is contrary to the Eighth Circuit's pre-*First Options* statement regarding the application of a similar NASD arbitrability provision: "[W]e hold that the parties' adoption of this provision *is* a 'clear and unmistakable' expression of their intent to leave the question of arbitrability to the arbitrators." *FSC*, 14 F.3d at 1312-13. As a result, the decision below promotes forum-shopping because Missouri litigants apparently will receive a different result on this FAA question in federal and state court.[8]

At the same time, however, the courts are not entirely lined up with what the Supreme Court of Delaware called the "majority federal view"—which only makes more urgent the need for certiorari to bring uniformity to the law. *See James & Jackson*, 2006 Del. LEXIS 130, at *9-10.[9] In contrast to the decisions discussed above, several courts have reached

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[8] "In step with the U.S. Circuit Courts . . . the significant majority of lower federal courts that have considered the question since *First Options* have likewise concluded that a party's clear and unmistakable intent to provide for arbitral determination of arbitrability may be incorporated by reference." Franco, *supra*, at 469-70; *see, e.g., Book Depot P'ship v. Am. Book Co.*, No. 3:05-CV-163, 2005 WL 1513155, at *3 (E.D. Tenn. June 24, 2005) ("[a]ssuming that the Sixth Circuit would join in this emerging line of authority," the court followed the reasoning of *Contec*).

[9] Petitioners are not aware of a federal circuit court or a state supreme court construing JAMS Rule 11(c). A federal district court, however, reached a conclusion analogous to those reached by federal courts with respect to the AAA Rules. *Lovell v. Harris Methodist Health Sys.*, No. 3:99CV2809G, 2000 WL 351384, at *3 (N.D. Tex. Mar. 10, 2000).

contrary conclusions and others have sidestepped the issue entirely.

For example, in stark contrast to the 2005 decisions of the Second and Eleventh Circuits in *Contec* and *Terminix*, *supra*, the Supreme Court of South Dakota concluded that same year that there was "no clear and unmistakable evidence of intent to arbitrate arbitrability" as a result of the parties' incorporation of the AAA Rules. *Flandreau Pub. Sch. Dist. v. G.A. Johnson Constr., Inc.*, 701 N.W.2d 430, 436-37 (S.D. 2005).

Similarly, citing this Court's decision in *AT&T*, the Seventh Circuit has found:

> NASD Code Section 35 does provide that the "arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code which interpretation shall be final and binding upon the parties." However, we do not believe that this provision is a clear and unmistakable expression of the parties' intent to have the arbitrators, and not the court, determine which disputes the parties have agreed to submit to arbitration.

Edward D. Jones & Co. v. Sorrells, 957 F.2d 509, 514 n.6 (7th Cir. 1992). However, in the *FSC* decision, cited above, the Eighth Circuit explained that "[w]e disagree" with the reasoning of the Seventh Circuit and reached a contrary decision. 14 F.3d at 1312.

More recently, the Federal Circuit held that "the question of whether the parties agreed to arbitrate [under the ICC] is to be decided by the court, not the arbitrator." *Microchip Tech., Inc. v. U.S. Philips Corp.*, 367 F.3d 1350, 1358 (Fed. Cir. 2004). As the Second Circuit later explained, the Federal Circuit's holding was "[i]n direct contrast to the holding in *Apollo*" because the *Microchip* court "relied on Supreme Court cases that either did not address whether there was clear and unmistakable evidence of the parties' intent to

submit arbitrability to an arbitrator, or found that such clear and unmistakable evidence was absent." *Contec*, 398 F.3d at 210 (citations omitted). The Second Circuit stated:

> In our view, these cases are not determinative when analyzing the factual situation presented by *Microchip, Apollo*, and the instant case, where incorporation of arbitration rules giving jurisdiction to the arbitrator provides clear and unmistakable evidence of the parties' intent to arbitrate issues of arbitrability.

Id.

A lack of analysis about the parties' intent regarding incorporated arbitration rules is inconsistent with the teaching of this Court that the FAA requires courts "to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms." *First Options*, 514 U.S. at 947 (internal quotation omitted).[10]

Accordingly, this petition presents a conflict between a decision of the highest court of a state, on the one hand, and the majority (but not unanimous) view, on the other, on an important and recurring question of federal law. A decision by the Court, therefore, would have widespread and profound effects on the application of the FAA. The courts plainly

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[10] The Tenth Circuit has held, without specific reference to AAA Rule R-7(a), that an arbitration agreement's incorporation of the AAA Rules was insufficient to delegate authority to arbitrate the issue of the *existence* of the arbitration agreement. *Riley Mfg. Co. v. Anchor Glass Container Corp.*, 157 F.3d 775, 780 (10th Cir. 1998). A more recent Tenth Circuit decision, however, stated that a "party who consents by contract to arbitration before the AAA also consents to be bound by the procedural rules of the AAA, unless that party indicates otherwise in the contract." *P & P Indus., Inc. v. Sutter Corp.*, 179 F.3d 861, 867-68 (10th Cir. 1999). It is unclear whether the Tenth Circuit's reference to the "procedural rules of the AAA" is sufficient to grant an arbitrator authority to determine the existence of an arbitration agreement (thus overruling the holding in *Riley*) or if it grants an arbitrator authority to determine only procedural questions of arbitrability.

need guidance concerning the issue presented, and this case is an optimal vehicle for addressing this legal issue because it involves three separate agreements and two separate sets of arbitration rules used throughout the country.

II. THIS CASE PRESENTS AN IMPORTANT FEDERAL QUESTION THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

Buckeye Check Cashing, Inc. v. Cardegna, 126 S. Ct. 1204 (2006), was the first occasion in nearly 40 years for this Court to reexamine its seminal decision in *Prima Paint Corp. v. Flood & Conklin Mfg., Co.*, 388 U.S. 395 (1967). In doing so, the Court reaffirmed that "regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Id.* at 1210.

Clearly, *Buckeye* informed courts and litigants that the validity of a contract remains an issue for arbitration. Equally clear, however, is the fact that *Buckeye* did not resolve all threshold arbitrability issues under the FAA.[11] In particular, *Buckeye* gave little guidance on the question of *who* should decide *whether* the parties agreed to arbitrate the merits of their dispute.

A. Review Should be Granted Because This Court Has Never Expressly Applied the *First Options* Standard to Incorporated Arbitration Rules

Twenty years ago, in *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986), this

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[11] For example, writing for the Court, Justice Scalia made clear that the decision in *Buckeye* "does not speak to the issue . . . [of whether] it is for courts to decide whether the alleged obligor ever signed the contract, whether the signor lacked authority to commit the alleged principal, and whether the signor lacked the mental capacity to assent." *Id.* at 1208 n.1 (citations omitted).

Court established the standard now used to determine whether a court or an arbitrator should decide if disputes are arbitrable. After noting that arbitration is a matter of contract, the Court stated that, "[u]nless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *Id.* at 649. Although the Court did not explain what evidence would meet this standard, *see id.* at 649-52, it appears that the terms of the collective bargaining agreement did not constitute the requisite evidence.

This ambiguity precipitated *First Options*, which is the most important FAA decision since *Prima Paint*. In *First Options*, as discussed in more detail above, the Court extended the "clear and unmistakable" requirement beyond the collective bargaining context. *See* 514 U.S. at 944.

Like *AT&T*, *First Options* did not elaborate on what constitutes clear and unmistakable evidence of the parties' intent to arbitrate arbitrability. Additionally, both cases were before the Court on agreements to arbitrate that deviate significantly from common arbitration agreements incorporating the AAA Rules or other similar rules.[12]

Then, in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002), the Court built on *First Options* by explaining that courts presumptively decide the gateway issues of whether "the parties are bound by a given arbitration clause" and whether "a concededly binding contract applies to a particular type of controversy." Arbitrators, on the other hand, presumptively decide procedural questions of arbitrability, such as "allegations of waiver, delay, or a like

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[12] In *AT&T Technologies*, the arbitration agreement was part of a collective bargaining contract. 475 U.S. at 644. In *First Options*, the brokerage customers did not sign the arbitration agreement, which was part of their corporation's agreement with the securities firm. 514 U.S. at 940-41.

defense to arbitrability." *Id.* at 84. Such allegations, explained Justice Breyer for the Court, are "an aspect of the controversy" and it is "reasonable to infer" that the parties intended for the arbitrator to decide that gateway issue. *Id.* at 80.

Lacking in these FAA decisions is guidance from this Court regarding if and when parties may overcome the presumption that the courts rather than arbitrators should decide arbitrability by incorporating separate rules that mandate arbitration of arbitrability.[13] According to a law professor who has studied the *Howsam* decision applying the rules and regulations of the NASD, the petitioner's brief contained an incorporation argument similar to the issue presented here:

> [T]his question [of incorporation] was not considered in *First Options* . . . . Therefore, the incorporation argument [in the *Howsam* brief] conclude[d], "[t]he arbitrators are . . . designated to interpret and apply § 10304, and in doing so, to determine what claims are eligible thereunder for submission to arbitration."
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> The fact that the [Supreme] Court refused even to acknowledge this argument suggests little support within the Court for such a strategy, even though some lower courts have been more receptive. Indeed, if the Court continues moving toward an actual consent theory of arbitrability, such strategies for accommodating *First Options* should be unavailing. The mere addition of a clause referencing extrinsic standards—including the intent to arbitrate arbitrability—surely would give little comfort to courts that require "clear and unmistakable"

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[13] More recently, in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452-53 (2003), the Court decided in a plurality opinion that, if an agreement to arbitrate is silent on the issue of the permissibility of class actions, the issue is presumptively for the arbitrator as a question of procedural arbitrability.

> evidence of such waiver because they are "understandably" concerned about "forc[ing] unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide.

Reuben, *supra*, at 868-69 (citations and footnotes omitted).

Professor Reuben's article appeared in 2003. Since then, as discussed *supra*, a number of courts have accepted the very incorporation argument that the Court did not acknowledge in *Howsam*. At a time when arbitration is becoming even more prevalent, it is particularly important for this Court to settle the effect under the FAA of incorporated arbitration rules providing the arbitrator with sole authority to determine the "existence," "scope," and "validity" of the agreement.

B. Review Should be Granted to Ensure that Arbitration Agreements Are Not Subjected to Discriminatory Enforcement

A fundamental purpose of the FAA is to "place arbitration agreements upon the same footing as other contracts." *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991). Therefore, under the FAA, "[a] court may not . . . in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law." *Perry v. Thomas*, 482 U.S. 483, 492 (1987).

As this Court has made clear, "[w]hen deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply *ordinary state-law principles* that govern the formation of contracts." *First Options*, 514 U.S. at 944 (emphasis added). One ordinary contract principle, of course, is the rule that incorporated language is to be interpreted as part of a contract. *See, e.g.*, 11 Richard A. Lord, *Williston on Contracts* § 30.24 (4th ed. 1999). Contract law in Missouri is no different. "In Missouri, matters

incorporated into a contract by reference are as much a part of the contract as if they had been set out in the contract in haec verba." *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 435 n.5 (Mo. banc 2003).

As a result, the failure of the decision below to give effect to the incorporated AAA and JAMS Rules is at odds with ordinary principles of Missouri contract law—and therefore also contrary to the FAA. Whether by specially devised rule or by discriminatory application of an otherwise generally applicable principle, the FAA "preclude[s] States from singling out arbitration provisions for suspect status." *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

While the Missouri legislature has not enacted a statute providing, for example, that "The contract principle of incorporation by reference applies to all agreements except agreements to arbitrate," the decision below achieves the same result. Review of this pivotal question, and the subsequent reversal of the Missouri Supreme Court's decision in this case, would be a proper and effective way to ensure it is clear to all courts that arbitration agreements must be enforced to the same extent as all other contracts.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPREME COURT OF MISSOURI
en banc

NITRO DISTRIBUTING, INC., et al.,
Respondents,

v.

JIMMY V. DUNN, et al.,
Appellants.

No. SC86854

May 2, 2006
As Modified on Denial of Rehearing June 30, 2006

STEPHEN N. LIMBAUGH, JR., *Judge*

Appellants seek reversal of the judgment of the circuit court overruling their motions to compel arbitration and stay litigation. After opinion by the Court of Appeals, Southern District, this Court granted transfer. Mo. Const. art. V, sec. 10. The judgment of the trial court is affirmed in part and reversed in part, and the case is remanded.[1]

I. Facts and Procedural History

This case concerns the business relationships between respondents and appellants arising from their participation in Pro Net Global Association, Inc. (Pro Net), a network of businesses engaged in the sale and distribution of Amway-related business support materials (BSMs). Respondents are Nitro Distributing, Inc. (Nitro) and West Palm Convention

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[1] A companion case involving most of the same issues, *Netco, Inc., et al. v. Jimmy V. Dunn, et al.*, 194 S.W.3d 353 (Mo. banc 2006) (No. SC 86855), is also decided this date.

Services, Inc. (West Palm), both owned by Ken Stewart, though Stewart personally is not a party. Appellants are: Jimmy V. Dunn (Dunn); Jimmy V. Dunn & Associates, Inc. (Dunn Associates); Harold Gooch, Jr. (Gooch); Gooch Support Systems, Inc. (Gooch Systems); Gooch Enterprises, Inc. (Gooch Enterprises); Bill S. Childers (Childers); TNT, Inc. (TNT); Thomas D. Foley (Foley); T&C Foley, Inc. (T&C); Steven S. Woods (Woods); G.F.I. International, Inc. (G.F.I.); Parker E. Grabill (Grabill); Grabill Enterprises, Inc. (Grabill Enterprises); Pro Net; Don Brindley (Brindley); Global Support Services, Inc. (Global); Pro Net Global I, Inc. (Pro Net I); and Robert A. Blanchard (Blanchard). As best as can be discerned, appellants are all Amway Corporation (Amway) distributors, Amway related businesses, or their respective principals.

Amway is not a party in this case, but the questions raised require a brief explanation of Amway's business practices as they relate to the parties that are involved. Amway is a multi-level marketing corporation consisting of a network of independent distributors structured in a pyramid-like hierarchy. As part of Amway's standard distributorship agreement, there are "Rules of Conduct" that include a mandatory arbitration clause requiring Amway distributors to submit any dispute to arbitration through JAMS/Endispute, Inc., an independent arbitration entity.

As a method of improving sales, Amway produces and distributes motivational products called "tools" and "functions" aimed at training and motivating distributors. "Tools" are audiotapes, videotapes and published materials, and "functions" are seminars, rallies and conventions. Together, the tools and functions are commonly referred to as BSMs. A number of other businesses affiliated with Amway distributors sell their own Amway-related BSMs, though Amway distributors themselves are prohibited from doing so under the Rules of Conduct. As used in the Amway corporate

culture, an Amway "organization" is a term of art for the conglomeration of an Amway distributorship, its owner(s), and their independent tools and functions businesses.

Pro Net was formed in 1998 to "facilitate the sale of Amway-related BSMs to its members," apparently as a kind of clearinghouse. Those wishing to join Pro Net were required to submit applications mandating compliance with Pro Net's "Terms and Conditions." This not only required members to abide by Amway's Rules of Conduct, but also required members to submit any dispute to arbitration under a separate arbitration clause in which arbitrations were to be administered by the American Arbitration Association.

Ken Stewart formed Nitro in 1988 as a tools business, and West Palm in 1992 as a functions business, for the support of his Amway distributorship, Stewart & Associates International, Inc. (Stewart Associates). In 1998, Stewart submitted a Pro Net membership application on behalf of Nitro, but neither Stewart, nor any officer or agent of West Palm signed a membership application on behalf of West Palm.

Prior to Pro Net's incorporation, BSM distributors known as the "Yager Group" supplied Stewart and other Pro Net founders with tools, and the Pro Net plan, in part, was to fold the Yager Group into Pro Net. During the period of transition from the Yager Group to Pro Net, the founders of Pro Net, including Stewart, entered into a "Transition to Pro Net" agreement. In part, the agreement required parties to submit disputes arising from the transition from the Yager Group to Pro Net to binding arbitration through JAMS/Endispute.

In 2001, Nitro and West Palm (but not Stewart Associates) filed lawsuits alleging, *inter alia*, that appellants were involved in a conspiracy to misappropriate respondents' businesses. Appellants—some, but not all, of whom are members of Pro Net—filed a motion to compel arbitration under Pro Net's Terms and Conditions, the Transition to Pro Net Agree-

ment, and Amway's Rules of Conduct. After considerable discovery, the parties submitted a voluminous amount of evidence to the motion court consisting of more than 3,700 pages of documents, affidavits, deposition transcripts and other materials. After a hearing and extended argument on the matter, the court overruled the motion. This appeal followed, as authorized under the Missouri Uniform Arbitration Act (MUAA), sec. 435.440, RSMo 2000.

II. Analysis

When faced with a motion to compel arbitration, the motion court must determine whether a valid arbitration agreement exists and, if so, whether the specific dispute falls within the scope of the arbitration agreement. *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 426, 427-28 (Mo. banc 2003). In making these determinations, the court should apply the usual rules of state contract law and canons of contract interpretation. *Id.* at 428. Appellate review is *de novo. Id.*

A. Amway Agreement

1. Nitro and West Palm as Non-signatories

Appellants first argue that Nitro and West Palm are bound by the arbitration clause contained in the Amway Rules of Conduct. However, neither Nitro nor West Palm are signatories to any agreement with Amway. Moreover, according to Amway's own documents, Nitro and West Palm are BSM businesses that operate in an industry entirely independent of Amway. Nonetheless, appellants seek to bind Nitro and West Palm as third-party beneficiaries of Ken Stewart or Stewart Associates' distributorship agreement with Amway.

To be bound as a third-party beneficiary, the terms of the contract must clearly express intent to benefit that party or an identifiable class of which the party is a member. *Peters v. Employers Mut. Cas. Co.*, 853 S.W.2d 300, 301 (Mo. banc

1993). In cases where the contract lacks an express declaration of that intent, there is a strong presumption that the third party is not a beneficiary and that the parties contracted to benefit only themselves. *State ex rel. William Ranni Assocs., Inc. v. Hartenbach*, 742 S.W.2d 134, 141 (Mo. banc 1987). Furthermore, a mere incidental benefit to the third party is insufficient to bind that party. *Id.* at 140. Here, the Amway distributorship agreement expresses no intent whatsoever to benefit Nitro and West Palm, and any benefit obtained from the agreement, if at all, was incidental. Accordingly, Nitro and West Palm are not third-party beneficiaries.

Appellants also attempt to bind Nitro and West Palm under the theory that they acted as agents of Ken Stewart or Stewart Associates. In support, appellants cite *Byrd v. Sprint Commc'ns Co., L.P.*, 931 S.W.2d 810, 815 (Mo. App. 1996), for the proposition that "non-signatory agents [are] bound by arbitration agreements signed by their principals." In our view, though, *Byrd* was wrongly decided. Under hornbook rules of agency, it is the principal that can be bound by the signature of the agent, not the agent that can be bound by the signature of the principal. This is so because the principal can control the conduct of the agent, which is the essence of the agency relationship. *State ex rel. Bunting v. Koehr*, 865 S.W.2d 351, 353 (Mo. banc 1993). It is not the other way around, that the agent can control the principal. Otherwise, the principal would be the agent for the agent. Thus, without the benefit of *Byrd*, the agency theory is to no avail, and the rule controls that "[a] party cannot be required to arbitrate a dispute that it has not agreed to arbitrate." *Dunn*, 112 S.W.3d at 436. To the extent it is to the contrary, *Byrd* is overruled.

Finally, appellants claim that Nitro and West Palm are bound to arbitrate under the Amway Rules of Conduct on the basis that they agreed to be bound by Pro Net's Terms and Conditions. The rationale is that Pro Net's Terms and Conditions contain a general requirement that Pro Net members

abide by the Amway Rules of Conduct, which include the Amway arbitration clause. This rationale, of course, presupposes that Nitro and West Palm are members of Pro Net, an issue that will be addressed, *infra*. Assuming, though, that Nitro and West are members of Pro Net and bound by Pro Net's Terms and Conditions, the Amway arbitration clause still does not apply. A separate Pro Net arbitration clause is explicitly set forth in the Terms and Conditions that is significantly different from the Amway clause and that is specific to Pro Net membership only. Under well-established contract principles, where an apparent inconsistency exists between a clause that deals with an issue specifically and one that deals with the same issue generally, the specific clause should be held to nullify the general clause. *State ex rel. Smith v. City of Springfield*, 375 S.W.2d 84, 91 (Mo. banc 1964). Because the Pro Net clause is specific to disputes "arising out of" or "relating to" Pro Net membership, the Amway Clause has been superseded by the Pro Net clause.

2. Scope of Amway Clause

Whatever their relationship with Amway, Nitro and West Palm contend that the scope of the arbitration agreement does not cover the disputes that are the subject of their petition against appellants. This Court agrees.

The Amway arbitration clause states:

> [T]he parties are required to submit any remaining claim(s) arising out of or relating to their Amway Distributorship, the Amway Sales and Marketing Plan, or the Amway Rules of Conduct (including any claim against another Amway distributor, or any such distributor's officers, directors, agents, or employees or against Amway Corporation or any of its officers, directors, agents, or employees) to binding arbitration in accordance with the Amway/ADA Arbitration Rules.

This is not a suit against Amway. Nor are Nitro and West Palm's claims brought pursuant to any Amway distributorship. Nor do Nitro and West Palm make any allegation pertaining to the Amway Sales and Marketing Plan. Nor do they allege that appellants violated the Amway Rules of Conduct or any other part of the Amway agreement. And in that regard, the petition expressly states, "This action is not predicated upon the Amway Rules (since the BSMs industry is not a party of the Amway business), nor does it seek the enforcement of any such Rules." Instead, the subject and entire focus of the lawsuit is that appellants allegedly conspired to misappropriate Nitro and West Palm's BSM businesses. According to Amway's own documents, in order to avoid antitrust concerns, BSM businesses are organized in and operate in an industry entirely independent of Amway. And in fact, Amway promulgated and distributed a separate BSM arbitration agreement for use by the Amway dealers' independent BSM businesses, in lieu of the arbitration clause in the Amway Rules of Conduct. Although this Court is mindful of the many cases holding that the scope of arbitration agreements is to be liberally construed, the Amway clause in this case is clear on its face and cannot be stretched to cover the lawsuit herein.

B. Transition to Pro Net Agreement

Appellants next argue that Nitro and West Palm are bound to arbitrate under the Transition to Pro Net Agreement on the basis that Ken Stewart signed the agreement on behalf of his "organization." Appellants' argument on this point, however, discounts the fact that Ken Stewart signed the agreement only in his individual capacity and not on behalf of any separate entity. The signature block of the agreement contains three lines: a "By" line, a "Dated" line, and a "For" line, and Stewart signed his name on the "By" line, leaving the "For" line blank. In contrast, a number of other signatories signed their names in the "By" line *in addition* to signing the name

of the corporation on behalf of which they were signing in the "For" line. In short, the Transition to Pro Net Agreement does not indicate any intent on the part of Stewart to bind Nitro and West Palm.

Appellants nevertheless maintain that "paragraph 1" of the transition agreement proves the point that Stewart signed on behalf of his "organization." That paragraph states:

> The Parties hereby agree to submit to final and binding arbitration with J*A*M*S/ENDISPUTE, in accordance with Rule 7 of the Amway/ADA Arbitration Rules and Procedures any and all issues arising out *of* the transition of the Foley, Gooch, Childers, Stewart and Woods organizations from working with D&B Enterprises, Inc. and InterNet Services to being responsible for the training and education of their distributor organizations.

The fallacy of appellants' argument, as Nitro and West Palm aptly put, "is that this paragraph defines the *scope* of arbitrable claims, not the *parties* to it." The focus, or scope, is on the "transition"—the claims arising from the split between the five organizations and D & B Enterprises and InterNet Services. The agreement binds Stewart individually to arbitrate any claims he may have individually that arise from the transition of his organization to the Pro Net scheme. But the scope of the arbitration clause is irrelevant in the determination of which parties bound themselves to it. The clause itself is no evidence that Stewart agreed to submit his "organization's" claims to arbitration.

C. Pro Net Agreement

1. West Palm

There is no dispute that West Palm did not sign a Pro Net membership application. However, appellants seek to compel West Palm to arbitrate under the arbitration clause in Pro Net's Terms and Conditions as a third-party beneficiary of

Ken Stewart or Stewart Associates' agreement with Pro Net. For the same reasons that West Palm is not a third-party beneficiary of the agreement with Amway, it is not a third-party beneficiary of the Pro Net agreement. The Pro Net Terms and Conditions do not express any intent to benefit West Palm. Further, to the extent that West Palm did obtain any benefit from Pro Net, the benefit was merely incidental to Stewart's relationship with Pro Net, and, as explained, an incidental benefit is insufficient to establish third-party beneficiary status.

Appellants also argue that West Palm is estopped from avoiding arbitration under the Pro Net agreement with Stewart because West Palm received benefits from Pro Net membership. To be sure, "[b]y accepting benefits, a party may be estopped from questioning the existence, validity and effect of a contract," *Dunn*, 112 S.W.3d at 437 (citing *Dubail v. Medical West Bldg. Corp.*, 372 S.W.2d 128, 132, (Mo. 1963)), but here, appellants do not identify any benefits to West Palm. They claim instead only that "Nitro and Stewart had access to the tapes of other Pro Net members that they otherwise would not have had the right to purchase and sell" and that "the Stewart Organization profited from selling Mr. Stewart's audio tapes through Pro Net . . . ." There is no allegation that West Palm, itself, as opposed to Nitro or Stewart Associates, was doing business with Pro Net or otherwise availing itself of Pro Net membership.

Appellants' legal theory on the estoppel issue is unclear, but it seems to be (1) that West Palm is estopped even if it benefited only indirectly from Nitro and Stewart's membership in Pro Net, (2) that West Palm is estopped because it is the alter ego of Nitro and Stewart Associates, and (3) that in any event, West Palm conceded that it is a member of Pro Net. On the first point, appellants cite no case holding that mere indirect benefits are sufficient to establish estoppel, and although Missouri courts have not expressly addressed the

issue, the authority from other courts is wholly to the contrary and wholly persuasive. *See, e.g., Thomson-CSF, S.A. v. American Arbitration Ass'n*, 64 F.3d 773, 779 (2d Cir. 1995). *See also* 31 C.J.S. *Estoppel and Waiver* sec. 123 (1996). The reasoning, of course, is that the nonsignatory is benefiting from the contractual relationship of those who are indeed parties to the contract, rather than benefiting from the contract, itself. *Thomson-CSF, S.A.*, 64 F.3d at 779.

On the second point—the alter ego theory—Appellants would have this Court disregard West Palm's status as a separate and independent corporation, but the only way to achieve that result is by piercing the corporate veil. That remedy, however, in the context of the issues presented here, is only available where outside control of the corporation has been used "to commit fraud or wrong, to perpetrate the violation of statutory or other positive legal duty, or [a] dishonest and unjust act . . . ." *66, Inc. v. Crestwood Redevelopment Corp.*, 998 S.W.2d 32, 40 (Mo. banc 1999). Suffice it to say that appellants have neither pled nor proven this element.

As for the third point, appellants make much of the fact that respondents pled in a related federal case that "Nitro and West Palm were lured into Pro Net and then boycotted or minimized." In the context of the entire complaint, however, plaintiffs were merely making the point that Pro Net was part of a larger conspiracy to misappropriate the respondents' businesses in which appellants were giving Amway-related companies the option of joining Pro Net or being boycotted from the BSMs industry. They were not, as appellants suggest, conceding that West Palm had agreed to the Pro Net Terms and Conditions or taken advantage of Pro Net membership. The same holds true, in context, for respondents' preparation of a summary chart for discovery purposes showing Nitro and West Palm under Pro Net's umbrella. There is no estoppel by concession.

In sum, because West Palm is a separate corporation from Nitro and Stewart Associates, was not a signatory to the Pro Net agreement, and did not accept direct benefits from Pro Net, it is not now estopped to deny Pro Net membership.

2. Nitro

The one point on which this Court disagrees with the trial court is its ruling that Nitro is not bound to arbitrate under the Pro Net agreement. It is undisputed that on the Pro Net application Stewart submitted, in the line provided for "Member Name," Stewart plainly wrote "Ken Stewart/Nitro Distributing." He then signed the application with his name, Ken Stewart, and in the line below that provided for "Title," he wrote "president—Nitro Distrib." He also included Nitro's Federal Tax Identification Number rather than his own. By executing the Pro Net application in this unequivocal way, Stewart, Nitro's president, bound Nitro to the Pro Net agreement. This is so because of the long-held precedent "that the president of a corporation may, without any special authority from its board of directors, perform all acts of an ordinary nature which by usage or necessity are incident to his office, and may bind the corporation by contracts in matters arising in the usual course of business." *Gaar v. Gaar's Inc.*, 994 S.W.2d 612, 619 (Mo. App. 1999) (citing *Sparks v. Desatch Transfer Co.*, 15 S.W. 417, 419 (Mo. 1891)).

Nitro claims, however, that the contract should be rescinded or reformed on the basis of Stewart's unilateral mistake in believing that BSM businesses like Nitro were eligible for Pro Net membership when, in fact, under the Pro Net bylaws, only Amway distributorships were eligible for membership. According to Nitro, the unilateral mistake prevented a meeting of the minds on the essential terms of the contract. Rescission on the basis of unilateral mistake, however, is warranted only in exceptional circumstances. Under the RESTATEMENT (SECOND) OF CONTRACTS, sec. 153 (1981):

> Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances *that is adverse to him*, the contract is voidable by him if he does not bear the risk of the mistake . . . .

(Emphasis added). In this case, the mistake clearly inured to the *benefit* of Nitro; it was not *adverse* to Nitro. Although Nitro was technically ineligible for membership, Pro Net in fact accepted Nitro's membership application and presumably afforded Nitro the benefits of membership nonetheless. Although the nature and extent of benefits afforded by Pro Net membership and the extent to which Nitro availed itself of those benefits (if at all) is a hotly contested issue, the critical point is that membership in Pro Net, whatever its worth, was not something adverse to Nitro. In denying relief to Nitro, this Court emphasizes that rescission is, after all, an equitable remedy, and that the unilateral mistake doctrine balances the equities by ensuring that the party seeking rescission cannot avoid its obligations under the contract where, as here, the mistake caused it no harm. This reasoning holds true for the remedy of reformation as well, and Nitro offers no independent legal argument in support of the remedy.

Alternatively, though, Nitro contends that even if it is to be considered a member of Pro Net, it should be classified under the Pro Net bylaws as a "founding" member, rather than a "regular" member, and that the arbitration provision was intended to apply only to those applying for regular membership. Although the bylaws do set out the classification of members as "founding" and "regular," and Stewart considered himself to be a founding member, the membership application he signed on Nitro's behalf stated unambiguously that the applicants were required to abide by the Pro Net Terms and Conditions, which included the arbitration provision. It is the most basic principle of contract law that

parties are bound by the terms of the contracts they sign and courts will enforce contracts according to their plain meaning, unless induced by fraud, duress, or undue influence. *Utility Service and Maintenance, Inc. v. Noranda Aluminum, Inc.*, 163 S.W.3d 910, 913 (Mo. banc 2005). Ultimately, Nitro fails to identify any legal theory to overcome the binding effect of Stewart's signature.

D. Appellants' Standing to Compel Arbitration

This Court's holding that Nitro is bound to arbitrate under the Pro Net arbitration clause is complicated by the fact that not all of the eighteen appellants are members of Pro Net so as to have standing to compel arbitration. Indeed, Nitro argues, for one reason or another, that none of the eighteen appellants are members of Pro Net. However, Pro Net itself can compel arbitration under the express language of the Pro Net Terms and Conditions, and Nitro concedes that appellant Blanchard, who is sued in his capacity as an officer of Pro Net, has the same rights as Pro Net. In addition, six of the appellants—Gooch, Childers, Foley, Woods, Grabill and Dunn—personally signed the Pro Net membership application. Although Nitro claims that all of these individuals except Dunn signed as "founding" members and that only "regular" members can avail themselves of the Pro Net arbitration clause, they, like Stewart and Nitro, did in fact sign the Pro Net membership application, were admitted to membership and, thus, can compel arbitration. Unlike Stewart, however, these individuals did not sign on behalf of their distributorships, Gooch Systems and Gooch Enterprises, TNT, T&C, G.F.I., Grabill Enterprises, and Dunn Associates, respectively. As to these seven appellants, Nitro requests "as a result of a misnomer" that four of them—T&C, GFI, Grabill Enterprises and Dunn Associates—be dismissed as parties defendant, and the trial court is directed to grant that request.

Though they stay in the case, the other three distributorship/appellants (Gooch Systems, Gooch Enterprises, and

TNT) cannot compel arbitration because they are not signatories to the Pro Net agreement. The same is true for appellants Pro Net I, Global, and Global's principal, Brindley. Although appellants correctly state that a non-signatory may, in some instances, compel a signatory to arbitrate under the theory that the plaintiff/signatory is estopped from refusing to arbitrate, that is not the case here. The estoppel theory in this context is most often applied in cases where a plaintiff alleges that a defendant is liable under the terms of a contract, even though the defendant was a non-signatory to the contract. These allegations might be made, for instance, in cases where the defendant itself is estopped from denying liability under the contract, or where defendant is a third-party beneficiary, or in cases where the defendant/non-signatory was an agent or alter ego of a signatory.[2] In a case frequently cited on this issue, the Seventh Circuit explained the rule as follows:

> [I]t would be manifestly inequitable to permit [plaintiff] to both claim that [the non-signatory party] is liable to [plaintiff] for its failure to perform the contractual duties described in the agreement and at the same time deny that [the non-signatory] is a party to that agreement in order to avoid arbitration of claims clearly within the ambit of the arbitration clause.

Hughes Masonry Co., Inc. v. Greater Clark County School Bldg. Corp., 659 F.2d 836, 838-39 (7th Cir. 1981). *See also Dominium Austin Partners, L.L.C. v. Emerson*, 248 F.3d 720 (8th Cir. 2001). Under this reasoning, the non-signatory in *Hughes* was able to compel arbitration because the very basis of the claim against the non-signatory was that it had breached duties and responsibilities purportedly assigned it by the agreement. This result follows in cases of this kind

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[2] These are, of course, the same categories of claims that defendants here have pressed against plaintiffs to hold them to the Amway and Pro Net contracts and the respective arbitration clauses.

because the plaintiff "should not be allowed to assume the inconsistent position of affirming a contract in part by accepting or claiming its benefits, and disaffirming it in part by repudiating or avoiding its obligations, or burdens." *Dubail*, 372 S.W.2d at 132.

The case at hand, however, is altogether different. Plaintiffs are not claiming that these appellants are liable for failing to perform some term of the Pro Net agreement but, instead, are arguing, as noted again, that Pro Net served as co-conspirator to misappropriate their business. Furthermore, to the extent these appellants contend that they should be allowed to compel arbitration under the related theory that the claims against them are "inextricably intertwined with those against Pro Net," that theory is inconsistent with the overarching rule that arbitration is ultimately a matter of agreement between the parties. *See Dunn*, 112 S.W.3d at 436.

E. Jury Trial Issue

Finally, Nitro contends that in the event this Court holds that the trial court erred in ruling that Nitro was not bound to arbitrate, then the proper disposition is not to order arbitration, but to remand for a jury trial as provided by the Federal Arbitration Act (FAA), and if not a jury trial, then a full evidentiary hearing replete with findings of fact and conclusions of law. Only then, Nitro contends, can the disputed factual issues be resolved to determine whether a valid arbitration agreement exists. Appellants, on the other hand, argue that the issues should be determined only in a summary proceeding, as specified in section 435.355(1).

As Nitro correctly observes, the FAA unambiguously provides for a jury trial when factual disputes arise in federal courts regarding the making of an arbitration agreement. 9 U.S.C. sec. 4 (2000). However, neither the United States Supreme Court nor this Court has determined whether parties are entitled to a jury trial when identical disputes arise in state

courts. While the FAA's substantive law applies in state courts, the procedural provisions of the FAA do not bind state courts unless the state procedures in some way defeat the rights granted by Congress. *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984). Thus, this Court will look to the procedures set out in the MUAA rather than the FAA. The pertinent MUAA procedure, then, is section 435.355(1), which states:

> On application of a party showing an agreement described in section 435.350, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court *shall proceed summarily* to the determination of the issue so raised and shall order arbitration if found for the moving party; otherwise, the application shall be denied.

(emphasis added). Although this Court has not expressly addressed the meaning of the term "proceed summarily," and the statute does not provide a special definition, under the legal definition, which this Court now adopts, summary proceedings are those that are conducted "[w]ithout the usual formalities [and] without a jury." BLACK'S LAW DICTIONARY 1476 (8th ed. 1999). *See also Rogers v. Dell Computer Corp.*, 127 P.3d 560 (Okla. 2005); *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266 (Tex. 1992) (holding that the "proceed summarily" language in the UAA does not require a jury trial on the existence of an arbitration agreement).

The language of section 435.355(1) notwithstanding, Nitro contends that the denial of a jury trial would deprive it of its constitutional right to a trial by jury in civil actions. However, this argument mischaracterizes the nature of the motion to compel arbitration, which, in essence, is an equitable remedy designed to compel specific performance of a term in a contract. *Rosenthal v. Great W. Fin. Sec. Corp.*, 926 P.2d 1061, 1070 (Cal. 1996). In civil actions, of course, the right to trial by jury attaches only to actions at law for which damages

may be awarded, not to suits in equity. *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82, 85 (Mo. banc 2003). Though the motion to compel arbitration is ancillary to the underlying action at law, it is a separate proceeding authorized under section 435.355(1) in which equitable relief is sought.

Nitro's fallback position that the summary proceeding conducted by the motion court was otherwise inadequate also fails. Where, as here, there were disputed factual issues, it is necessary to conduct an evidentiary hearing. However, given the summary nature of the proceedings, it is not enough for Nitro to say that the motion court declined to entertain live witnesses and cross-examination or to provide findings of fact and conclusions of law. As noted, the motion court was provided with more than 3700 pages of documents, affidavits, deposition transcripts and other materials with which to resolve the factual disputes. Having also reviewed this voluminous mass, this Court is quite satisfied that the evidence presented on both sides was more than ample to resolve those disputes in the summary fashion dictated by the statute.

III. Summary and Conclusion

This Court holds:

1. Nitro was not entitled to a jury trial to determine whether a valid arbitration agreement exists, and the motion court properly conducted a summary proceeding on that issue.

2. At the request of Nitro and West Palm, the trial court is directed to dismiss appellants T&C, GFI, Grabill Enterprises and Dunn Associates as parties defendant.

3. Nitro is bound to arbitrate its claims against appellants Gooch, Childers, Foley, Woods, Grabill, Dunn, Pro Net, and Blanchard under the arbitration clause set out in the Terms and Conditions of the Pro Net agreement.

4. Nitro is not bound to arbitrate its claims against appellants Gooch Systems, Gooch Enterprises, TNT, Pro Net I, Global and Brindley under the Pro Net agreement, nor is Nitro is bound to arbitrate its claims against any of the appellants under the arbitration clauses in the Amway agreement or the Transition to Pro Net agreement.

5. West Palm is not bound to arbitrate its claims under any of the three arbitration clauses.

Because some of the appellants can compel Nitro to arbitrate and others cannot and because West Palm cannot be compelled to arbitrate by any of them, the issue arises whether the trial court should stay the litigation of all the claims pending arbitration. The parties agree that this determination lies within the trial court's discretion and that the case must be remanded for that purpose. *See AgGrow Oils, L.L.C. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 242 F.3d 777, 782-83 (8th Cir. 2001); *Fru-Con Constr. Co. v. Sw. Redev. Corp. II*, 908 S.W.2d 741, 746 (Mo. App. 1995).

The judgment of the trial court is affirmed in part and reversed in part, and the case is remanded.

All concur.

APPENDIX B

MISSOURI COURT OF APPEALS
Southern District
Division Two

[Filed April 15, 2005]

No. 26063

NITRO DISTRIBUTING, INC., et al.,
Respondents,

vs.

JIMMY V. DUNN, et al.,
Appellants.

APPEAL FROM THE CIRCUIT COURT OF
GREENE COUNTY, MISSOURI

Honorable J. Miles Sweeney, *Judge*

REVERSED AND REMANDED WITH DIRECTIONS.

This cause of action arises out of the business relationship between Appellants[1] and Respondents Nitro Distributing, Inc. ("Nitro") and West Palm Convention Services, Inc. ("West

[1] As best we discern, Appellants are all Amway Corporation ("Amway") distributors, Amway related businesses, or their respective principals. The following parties are Appellants herein: Jimmy V. Dunn ("Dunn"); Jimmy V. Dunn & Associates, Inc. ("Dunn Associates"); Harold Gooch, Jr. ("Gooch"); Gooch Support Systems, Inc. ("Gooch Systems"); Gooch Enterprises, Inc. ("Gooch Enterprises"); Bill S. Childers ("Childers"); TNT, Inc. ("TNT"); Thomas D. Foley ("Foley"); T&C Foley, Inc. ("T&C"); Steven S. Woods ("Woods"); G.F.I. International, Inc. ("G.F.I."); Parker E. Grabill ("Grabill"); Grabill Enterprises, Inc. ("Grabill Enterprises"); Pro Net; Don Brindley ("Brindley"); Global Support Services, Inc. ("Global"); Pro Net Global I, Inc. ("Pro Net Profit"); and, Robert A. Blanchard ("Blanchard").

Palm") (collectively "Respondents"), both owned by Ken Stewart ("Stewart"). The parties' dispute arises from their participation in a network of business organizations called Pro Net Global Association, Inc. ("Pro Net").

To better understand our analysis of Appellants' points relied on, it is necessary that we recite certain evidentiary matters as revealed by the record.

The record reveals that the parties' relationship is based on their involvement with Amway. Amway, now known as "Alticor" or "Quixtar," is a multi-level marketing business which sells consumer goods through a vast network of independent distributors. These Independent Business Owners ("IBOs") merchandise products directly to consumers, not in fixed retail stores.

The Amway business structure and the distribution of its products is governed by the Amway Rules of Conduct ("Rules of Conduct"), to which each Amway distributor is required to subscribe in its initial "Distributor Application."[2]

With each IBO acting as an independent contractor, Amway employs a pyramid-like structural hierarchy. Every IBO is in charge of building and managing its own sales force by recruiting and sponsoring new distributors, who are then supplied and trained to sell Amway products.

IBOs are compensated by receiving a percentage of the sales from their entire sales pyramid as well as from earnings derived from their own sales to retail customers. The distributorships that occupy positions below a particular IBO in each branch of the Amway network are referred to as that IBO's "downline." As such, an IBO's downline includes those persons the IBO personally sponsors, as well as people

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[2] The Rules of Conduct define and establish certain principles to be followed in the development and maintenance of an Independent Business ("IB") and the rights, duties and responsibilities of each IBO.

whom those below them sponsor. Conversely, those distributorships that occupy positions in the network above a given IBO are referred to as that distributorship's "upline." These positions are determined by the essential Amway concept of the "line of sponsorship." Amway distributors are instructed that respect and observance of the line of sponsorship is mandatory; that they should support and edify their upline distributors; and, that their upline distributors are there to teach and support them.

With that being said, the present matter does not directly involve the purchase or sale of Amway products. Instead, this matter relates to the parallel business of selling Business Support Materials ("BSMs") to Amway distributors.

IBOs use these non-Amway produced BSMs, called "tools" and "functions," as a way to train, guide, and motivate their downline sales force. "Tools" are sponsoring and merchandising aids, such as audio and video tapes, literature and flip charts. Similarly, "functions" are educational seminars, rallies, and other meetings conducted by distributors for others in their line of sponsorship.

The use and distribution of these independently produced BSMs "are entirely optional;" are "strictly voluntary;" and, "must comply" with specific provisions of the Rules of Conduct.

In the present matter, Stewart became involved with Amway in 1985 and incorporated non-party Stewart & Associates International, Inc. ("Stewart Associates") as an Amway distributorship.[3]

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[3] In their "Application for Amway Distributor Authorization (Corporate)," Stewart and Stewart Associates agreed to "comply with the Amway Sales and Marketing Plan and the Code of Ethics and Rules of Conduct for Amway distributors."

In 1988, Stewart incorporated Nitro as an entity which would engage solely in the tools business.[4] According to Stewart, the purpose of Nitro was to facilitate the tools business for the Stewart Associates Amway distributorship. In fact, "Nitro owned and operated a multimillion dollar warehouse in Springfield, Missouri, where tapes and other tools were stored for sale and dissemination to the Stewart Organization downline."

Thereafter, in 1996, Stewart incorporated West Palm in the state of Florida. Prior to its incorporation in Florida, West Palm was a Missouri corporation whose charter dated back to 1992. West Palm is engaged in the function business and "facilitated the rally, convention and function business for Stewart Associates and Ken Stewart . . . ." Stewart maintains that Nitro "operate[d] in tandem with [West Palm] to build, support and enhance Stewart Associates' Amway business."[5]

Over the twenty years in which Stewart was involved in the Amway business, he built a downline network of over seventy thousand independent distributors; had over eighteen thousand distributors attend one of his major functions; and, reached the coveted "crown" status within Amway.

In 1998, Pro Net was formed as an organization "to facilitate the sale of Amway-related [BSMs] by its members." Pro Net proposed that Pro Net members would transfer to Pro Net the copyright and intellectual property rights in the BSMs

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[4] Rule 3.14.2 of the Amway Rules of Conduct prohibits an Amway distributorship from engaging in any business other than the sale of Amway products or services. Accordingly, as the tool and function business is not technically part of Amway, it is "customary for the distributor to operate his/her tool and function business through one or more different corporations, separate from the operating entity for the distributor's Amway business."

[5] West Palm, Nitro, and Stewart Associates are referred to by Stewart as the "Stewart Organization."

they produced. Pro Net would, in turn, make the members' tapes available for sale and distribution to all other Pro Net members. Pro Net contracted with Appellant Global to fill the orders of its members and distribute the BSMs.

The "Founding Members" of Pro Net, most of whom are Appellants herein, were Respondents' upline or cross-line distributors within the Amway line of sponsorship.[6] Prior to Pro Net's incorporation, the Founding Members invited Stewart to join them in creating and incorporating Pro Net. Stewart then entered into discussions with them to join the organization as a Founding Member.[7]

During this transitional period in early 1998, before the actual creation of Pro Net, the Founding Members of Pro Net entered into an arbitration agreement.[8] This "Transition-to-Pro Net" agreement was signed by Yager, Foley, Stewart, Childers, and Woods on March 1, 1998; by Brown on April 6, 1998; and, by Gooch on May 14, 1998.[9]

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[6] The Founding Members of Pro Net were Gooch; Stewart; Woods; Foley; and Childers. Gooch, Childers, and Dunn were part of Stewart Associates' upline; however, Foley, T&C, Woods, G.F.I., Grabill, and Grabill Enterprises were members of Stewart Associates' cross-line due to the fact that they were in the Gooch line of sponsorship.

[7] In anticipation of the creation of Pro Net, Nitro consigned approximately $650,000.00 worth of tools to Pro Net in order to stock Pro Net's Florida warehouse. Shortly after making the shipment to Pro Net, Nitro closed its own warehouse in August of 1998.

[8] In addition to Stewart, Gooch, Woods, Foley, and Childers, other parties to this agreement were Yager, on behalf of his companies D&B Enterprises, Inc. ("D&B") and InterNet Services ("InterNet"), and Paul Brown ("Brown") on behalf of Global. As best we can glean from the record, D&B and InterNet had previously been supplying BSMs to the Founding Members and their downlines.

[9] The Transition-to-Pro Net agreement stated, *inter alia*:

> The Parties hereby agree to submit . . . to final and binding arbitration with J.A.M.S./ENDISPUTE, in accordance with Rule 7 of

Thereafter, on July 2, 1998, Stewart signed a "Pro Net Global Association Membership Application," and submitted the form to Pro Net.[10] As explained more fully below, it appears from the record that Stewart agreed to join the organization and was considered to be a Founding Member of Pro Net. Stewart became a member of Pro Net's original board of directors, acted as Secretary of the organization, and was a member of the Pro Net "Steering Committee."

Attached to the Pro Net Membership Application submitted by Stewart were the Pro Net Terms and Conditions. The Pro Net Terms and Conditions included the statement that "[m]ember agrees to adhere to the Amway Corporation's Code of Ethics and Rules of Conduct for distributors, the Association's Bylaws" and "[m]ember agrees to refrain from using [BSMs] unless they have been approved by the Association."

In addition, Paragraph 11 of the Pro Net Terms and Conditions contained an alternative dispute resolution provision applicable to all members:

> Any dispute, controversy, or claim arising out of, relating to, or concerning the interpretation or performance of the contract created by acceptance of the Membership Application, or the breach thereof, or any dispute, controversy, or claim between one or more members of

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> the Amway/ADA Arbitration Rules and Procedures any and all issues arising out of the transition of the Foley, Gooch, Childers, Stewart and Woods organizations from working with D&B Enterprises[,] Inc[.] and InterNet Services to being responsible for the training and education of their distributor organizations.

[10] Stewart filled out the Pro Net Membership Application in the name of "Ken Stewart / Nitro Distributing" and signed the form as "president—Nitro Distrib." Despite this action by Stewart, Respondents maintain that neither Nitro nor West Palm were members of Pro Net; instead it is their assertion that non-party Stewart Associates was the only member of the Stewart Organization bound by the Pro Net Membership Application.

> the Association or between the Association and any of its members which cannot be resolved through negotiation . . . shall be submitted to mediation administered by the Association. Each party to the dispute shall name a mediator who shall be an Association Member at the diamond level or higher of Amway. Upon the selection of two mediators, the two chosen mediators shall select a third mediator who shall be an Association Member at the diamond level or higher of Amway. If agreement is not reached by the parties by mediation, any Dispute shall be submitted to and settled by binding arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules in effect at that time, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction . . . .

According to Gooch, the above dispute resolution clause was added to the Pro Net Terms and Conditions because "Amway had just incorporated an arbitration provision in its rules and that [Pro Net] wanted to follow the same approach."

Later, Respondents brought suit against Appellants, claiming, *inter alia*, that Appellants "and their co-conspirators conduct[ed] wrongful and illicit schemes to misappropriate [Respondents'] tool and function business" and that in their "ruthless pursuit of [Respondents'] tool and function business," Appellants made repeated "efforts to monopolize, control and manipulate the tool and function business."[11]

In their "Third Amended Petition," Respondents set forth fourteen counts against Appellants: unlawful pyramid scheme; tortious interference; "Breach of Implied-in-Fact Contract

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[11] The record is unclear as to when the original petition was filed in this matter; however, we note that the "First-Amended Petition" was filed on December 7, 2001, and the "Third Amended Petition" was filed on November 15, 2002.

Concerning the Tool Business;" "Breach of Duty of Good Faith and Fair Dealing Concerning the Contract Governing the Tool Business;" "Breach of Implied-in-Fact Contract Concerning the Function Business;" "Breach of Duty of Good Faith and Fair Dealing Concerning the Contract Governing the Function Business;" "Breach of Duty of Good Faith and Fair Dealing Concerning Nitro's Consignment of BSMs Inventory to ProNet;" promissory estoppel; fraudulent misrepresentation; negligent misrepresentation; "Antitrust Violation—Conspiracy to Monopolize;" "Antitrust Violation—Group Boycott;" "Antitrust Violation—Price Fixing and Allocation of Customers;" and, "Antitrust Violation—Illegal Tying Arrangement."

As previously related, in response to Respondents' claims, Appellants filed a motion to compel arbitration and stay the proceedings.[12] In a four-line "Order," the trial court denied Appellants' motion to compel arbitration and stay litigation, to-wit:

> NOW, on this 22nd day of January, 2004, it is ORDERED that, after consideration, [Appellants] Motion to Compel Arbitration and Stay Litigation and [Appellants'] Motion for Rehearing are hereby denied. The Court orders the parties to mediate the case within ninety (90) days unless a timely appeal or writ is filed in regard to this determination.[13] This appeal followed.

Appellants' three points of trial court error are premised upon the trial court's denial of their motion to stay litigation and compel arbitration. In their first point on appeal,

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[12] The motion to compel arbitration was filed by Appellants Dunn, Dunn Associates, Gooch, Gooch Systems, Gooch Enterprises, Childers, TNT, Foley, T&C, Woods, G.F.I., Grabill, Grabill Enterprises, Global, Pro Net, Pro Net I, and Blanchard.

[13] This same Order was issued in *Netco, Inc., et al., v. Jimmy Dunn, et al.*, a companion case to the present matter, which involves many of the same Appellants as in this appeal and is similarly on appeal in this Court.

Appellants maintain the trial court erred in basing its decision only on the arbitration clause in the Amway Rules of Conduct and in failing to specifically address the separate Pro Net arbitration agreement which bound all of the parties to arbitrate independent of the Amway Rules of Conduct. In their second point, Appellants assert the trial court erred in basing its decision solely on the arbitration clause in the Amway Rules of Conduct and in failing "to consider the Transition-to-Pro Net arbitration agreement which bound [Respondents] and fourteen of the eighteen [Appellants] to arbitrate all issues in this case." In their last point, Appellants contend the trial court misapplied the law in concluding the Amway arbitration procedures were unconscionable, because the Amway Rules of Conduct bound all the parties in this matter and, accordingly, required arbitration.

"An appellate court's review of the arbitrability of a dispute is de novo." *Dunn Indus. Group, Inc. v. City of Sugar Creek*, 112 S.W.3d 421, 428 (Mo. banc 2003). "Whether a dispute is covered by an arbitration clause is a matter of law." *Azbill v. UMB Scout Brokerage Servs., Inc.*, 129 S.W.3d 480, 483 (Mo.App. 2004). "[C]ourts favor and encourage arbitration proceedings.'" *Getz Recycling, Inc. v. Watts*, 71 S.W.3d 224, 228. (Mo.App. 2002) (quoting *Metro Demolition and Excavating Co. v. H.B.D. Contracting, Inc.*; 37 S.W.3d 843, 846 (Mo.App. 2001)).

Both the United States Congress and the Missouri General Assembly have enacted arbitration legislation. *See* 9 U.S.C.S. § 1 (2004), *et seq.*; § 435.350.[14] This Court recognizes the

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[14] "Missouri has adopted the Uniform Arbitration Act ("UAA"), fashioned after the federal act, found in §§ 435.350-.470 . . . ." *Sheffield Assembly of God Church, Inc. v. Am. Ins. Co.*, 870 S.W.2d 926; 929 (Mo.App. 1994). Section 435.350 provides that:

> [a] written agreement to submit any existing controversy to arbitration or a provision in a written contract, except contracts of insurance and contracts of adhesion, to submit to arbitration any

existence of a public policy of actively enforcing private arbitration agreements under both the Federal Arbitration Act ("FAA") and the UAA. *Greenwood v. Sherfield*, 895 S.W.2d 169, 173 (Mo.App. 1995). However, when an arbitration agreement involves interstate commerce, the effect of the arbitration clause is governed by the FAA, whether suit is brought in state or federal court.[15] *Byrd v. Sprint Communications Co.*, 931 S.W.2d 810, 813 (Mo.App. 1996).

Under the FAA, "[d]oubts as to arbitrability should be resolved in favor of coverage." *Dunn*, 112 S.W.3d at 429; see 9 U.S.C.S. § 2 (2004).[16] *See Moses H. Cone Mem'l Hosp. v. Mercury Constr.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 941, 74 L.Ed.2d 765, 785 (1983); *McCarney v. Nearing, Staats, Prelogar and Jones*, 866 S.W.2d 881, 890 (Mo.App, 1993).

"Before a party may be compelled to arbitrate under the FAA, a court must determine whether a valid agreement to arbitrate exists between the parties and whether the specific dispute falls within the substantive scope of that agreement."

> controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Unless otherwise specified, all statutory references are to RSMo 2000 and all Rule references are to Missouri Court Rules (2005).

[15] "Because the contracting parties in this case reside in different states, this agreement relates to interstate commerce within the meaning of the FAA." *Swain v. Auto Servs., Inc.*, 128 S.W.3d 103, 106-107 (Mo.App. 2003); see 9 U.S.C.S. § 2 (2004); *Duggan v. Zip Mail Servs., Inc.*, 920 S.W.2d 200, 202 (Mo.App. 1996).

[16] 9 U.S.C.S. § 2 (2004) states:

> A written provision . . . to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Dunn, 112 S.W.3d at 427-28; *see Houlihan v. Offerman & Co., Inc.*, 31 F.3d 692, 694-95 (8th Cir. 1994). As previously related, "'[w]hether a dispute is covered by an arbitration clause is relegated to the courts as a matter of law and is to be determined from the contract entered into by the parties.'" *Estate of Athon v. Conseco Fin. Servicing Corp.*, 88 S.W.3d 26, 30 (Mo.App. 2002) (quoting *Greenwood*, 895 S.W.2d at 174).

In their first point relied on, Appellants posit the Pro Net arbitration provision was a valid agreement which was completely independent of the Amway provision and required arbitration under the rules of the American Arbitration Association ("AAA"), not under the Amway Rules of Conduct. Appellants argue that Nitro is bound by the Pro Net clause through Nitro's membership in Pro Net and Pro Net's acceptance of Nitro's application for membership. Further, Appellants premise West Palm is bound by the Pro Net clause because "its claims are integrally related to its association with Pro Net" and its closeness with Nitro. Appellants also assert Respondents are bound by the Pro Net agreement as a third party beneficiary and/or under the doctrine of equitable estoppel. Accordingly, Appellants maintain that all of the claims in this matter arise under the Pro Net agreement and that the Pro Net Terms and Conditions cover the parties' dispute.

With that being said, "Missouri courts have held that under either the Missouri Arbitration Act or the [FAA] 'before a court may grant a party's motion to compel arbitration, it must decide whether the agreement containing the arbitration provision is valid and legally binding.'" *Estate of Burford ex rel. Bruse v. Edward D. Jones & Co., L.P.*, 83 S.W.3d 589, 592 (Mo.App. 2002) (quoting *Hitcom Corp. v. Flex Fin. Corp.*, 4 S.W.3d 618, 620 (Mo.App. 1999)). "The trial court, not an arbitrator, is the one to resolve" issues related to the validity of the contract. *Silver Dollar City, Inc. v. Kitsmiller*

Constr. Co., Inc., 874 S.W.2d 526, 536 (Mo.App. 1994). The trial court must determine (1) that a valid agreement exists between the parties and (2) that the dispute at issue falls within that agreement. *Dunn*, 112 S.W.3d at 427-28. If the court finds that the contract containing an arbitration agreement is valid and binding on the parties, the moving party is entitled to an order compelling arbitration.[17] *Silver Dollar City*, 874 S.W.2d at 537. "If the trial court finds the contract void or, for some other reason, unenforceable, there is obviously no valid arbitration provision." *Id.* In such determinations, "general state law principles of contracts and agency govern the question of which parties are bound by an arbitration agreement." *Byrd*, 931 S.W.2d at 813. "[G]enerally, applicable state law contract defenses, such as fraud, duress and unconscionability, may be used to invalidate arbitration agreements without contravening the FAA." *Swain*, 128 S.W.3d at 107; *see Doctor's Asssoc., Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 1656, 134 L.Ed.2d 902, 909 (1996). "As the obligation to arbitrate rests on free assent and agreement, the subsistence and validity of an arbitration clause are governed by the usual rules and cannons [sic] of contract construction." *Greenwood*, 895 S.W.2d at 174.

As previously set out, Nitro disputes it was a member of Pro Net. Nitro maintains it could not have been bound by the Pro Net arbitration provision because (1) it was ineligible for membership in Pro Net; (2) even if it were eligible for membership, it was a Founding Member and the arbitration

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[17] "The right of appeal is purely statutory," *Albright v. Kelley*, 926 S.W.2d 207, 209 (Mo.App. 1996). Under section 435.440.1(1), "[a]n appeal may be taken from . . . [a]n order denying an application to compel arbitration made under section 435.355." We have jurisdiction to review the trial court's Order denying Appellants' motion to compel arbitration and stay the proceedings. *See Dunn*, 112 S.W.3d at 427; *Greenwood*, 895 S.W.2d at 172.

provision was only applicable to Regular Members; and, (3) Nitro never received a written letter accepting its Pro Net Membership Application.

In our review, we first note Nitro maintains that as a tools business it was ineligible for membership in Pro Net because the Pro Net Bylaws limited membership to "[a]ny company or business that is engaged in distributing AMWAY products or services." According to Nitro, the only member of the Stewart Organization that was also a member of Pro Net was non-party Stewart Associates. Despite Nitro's contention that it was not a member of Pro Net, it should be recalled that Stewart completed and submitted the Pro Net Membership Application in which he specifically wrote "Ken Stewart/ Nitro Distributing" in the "Member Name" line and signed the document in his capacity as "president—Nitro Distrib." As further proof of Nitro's seeking membership in Pro Net, on the line designated for "Member's Tax Identification Number or Social Security Number" Stewart did not write his own social security number or even Stewart Associates' Federal Tax Identification Number; instead, he wrote "43-1494962," which is Nitro's Federal Tax Identification Number. Further, in the "Third Amended Petition," Nitro plainly states that "Nitro *joined* the Pro Net fold . . . ." (Emphasis added.) By his signature, Stewart bound Nitro to the Pro Net agreement. *See Gaar v. Gaar's Inc.*, 994 S.W.2d 612, 619 (Mo.App. 1999) (holding that "the president of a corporation may, without any special authority . . . perform all acts of an ordinary nature which by *usage* or *necessity* are incident to his office, and may bind the corporation by contracts in matters arising in the usual course of business.")

Second, we turn to Nitro's argument that even if it were a member of Pro Net, the arbitration provision was only applicable to Regular Members and not to Founding Members such as itself.

According to Nitro, it was Stewart's understanding "that the [F]ounding [M]embers of Pro Net would not be subject to the terms and conditions that were being drafted for Pro Net membership because those terms and conditions, which included a dispute resolution procedure, would apply only to the [R]egular [M]embers." Nitro bases this assertion in part on the "plain and express language" of the Pro Net Membership Application, which stated "[t]his Membership Application must be completed by all applicants . . . for regular membership in Pro Net Global Association." Nitro further argues that the application for membership clearly stated "[t]his is an application for non-voting membership;" whereas, Founding Members were given voting rights in the Pro Net Bylaws.

The record shows that a Founding Member was defined in the Pro Net Bylaws as "[a]ny company or business that is engaged in distributing AMWAY products or services and supports the objectives of [Pro Net] . . . provided such company joined [Pro Net] at the time [Pro Net] was formed." Regular membership was similarly limited to "[a]ny company or business that is engaged in distributing AMWAY products or services . . . ." The Pro Net Bylaws required that all "Organizations seeking membership in [Pro Net] as Regular Members must submit a completed application . . . ."

It is noteworthy that each and every Founding Member of Pro Net filled out and submitted a Pro Net Membership Application for *regular* membership.[18] Saliently, the four

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[18] The Pro Net Membership Applications of the other Founding Members read as follows: Gooch wrote "Hal & Susan Gooch" in the "Member Name" line, signed the document in his own name, and wrote "President" next to the word "Title;" Childers wrote "Bill Childers—Hona Childers" in the "Member Name" line, signed his own name, and left the designation for "Title" blank; Foley wrote "Tim and Connie Foley" in the "Member Name" line, signed the document in his own name, and wrote "Pres. Foley Mgmt. Intl." in the line designated for "Title;" and, Woods

other members of the Steering Committee, besides Stewart, maintain "[t]here was never any discussion . . . that the terms and conditions of membership should not apply to the [F]ounding [M]embers. It was fully understood that the terms and conditions of membership applied to every member, both [F]ounding [M]embers and [R]egular [M]embers, regardless of when they became a member." We also note there was no specific provision in either the Pro Net Bylaws or the Pro Net Terms and Conditions which exempted Founding Members from the arbitration provisions.

"[G]eneral state law principles of contracts and agency govern the question of which parties are bound by an arbitration agreement." *Byrd*, 931 S.W.2d at 813. When Nitro submitted its Pro Net Membership Application for regular membership, which clearly set out that "[t]he undersigned applicant agrees to abide by all Terms and Conditions of Association Membership," it was contractually bound by the arbitration provision contained in those terms and conditions. Under the particular circumstances in this case, any distinction between Founding Members and Regular Members, as related to the Pro Net Terms and Conditions previously set out, was made moot when the Founding Members, including Nitro through Stewart, signed their respective applications for *regular* membership in Pro Net.

Lastly, Nitro argues that it was not a member of Pro Net because it never received a written letter of acceptance from Pro Net. While the record is unclear as to whether Pro Net sent such letters to any members, we find this contention to be without merit due to the fact that after receipt of the membership application, Pro Net allowed the Stewart Organization, including Nitro, to engage in the full benefits of membership. "The manifestation of acceptance of an offer

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wrote "Steve Woods" in the line for "Member Name," signed the document with his own name, and left the line for "Title" blank.

need not be made by the spoken or written word; it may also come through the offeree's conduct in accord with the terms of the offer." *Medicine Shoppe Int'l, Inc. v. J-Pral Corp.*, 662 S.W.2d 263, 271 (Mo.App. 1983).

Based on the foregoing, the trial court erred in its implicit determination that, *inter alia*, Nitro was not bound under the terms of the Pro Net agreement.

We turn now to the issue of whether West Palm is bound to arbitrate under the terms of the Pro Net agreement. We recognize that while the federal policy favoring arbitration is strong, it alone cannot authorize a non-party to invoke arbitration or require a non-signatory to arbitrate. *Greenwood*, 895 S.W.2d at 174.

Among Appellants' arguments, they assert that West Palm was a party to the Pro Net arbitration agreement based on the principles of equitable estoppel.

In *Casarotto*, the Supreme Court of the United States noted that "[b]y enacting [9 U.S.C.S.] § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" *Cassarotto*, 517 U.S. at 687 (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511, 94 S.Ct. 2449, 2453, 41 L.Ed.2d. 270, 276 (1974)). More recently, in *Dunn*, the Supreme Court of Missouri observed that "[b]y accepting benefits, a party may be estopped from questioning the existence, validity, and effect of a contract" *Dunn*, 112, S.W.3d at 437.

Based on the record before us, this Court determines West Palm both embraced and benefited from Nitro's agreement with Pro Net. We note preliminarily that Stewart, as well as the members of the Pro Net organization, classified Nitro, West Palm and Stewart Associates as a singular "Stewart Organization," and paid little deference to the individual

nature of the separate entities.[19] In their "Third Amended Petition," Respondents themselves pled that "West Palm facilitated the rally, convention and function business for Stewart Associates and Ken Stewart, and operated in tandem with Nitro to build, support and enhance Stewart Associates' Amway business." Indeed, Respondents set out that "Nitro, West Palm and non-party Stewart Associates are collectively referred to herein at times as the 'Stewart Organization.'"

The record also shows that Nitro and West Palm operated out of the same office; Stewart was the principal of both corporations; and, both corporations used the same phone and facsimile number. In Respondents' own words, West Palm worked with Nitro and Stewart Associates "in sponsoring, organizing and holding . . . major functions, which regularly drew thousands of Amway distributors . . . ." In their petition, Respondents stated that "Nitro and West Palm, working in concert, participated in and were highly successful . . ." in the BSMs business. In fact, Respondents concede that if "Nitro is eligible for membership in Pro Net, it, as well as West Palm and non-parties Ken Stewart and Stewart Associates, are '[F]ounding' [M]embers." Based on the foregoing, there is no denying that Nitro's agreement with Pro Net was set up to benefit the entire Stewart Organization, including West Palm.[20]

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[19] Appellants allege no specific principal-agent relationship between Nitro, West Palm, Stewart Associates and Stewart in their argument regarding the Pro Net agreement.

[20] As best we discern, Pro Net intended its members to be neither individuals nor individual entities; instead, Pro Net classified its members as "Organizations" or by the last name of their principals and did not consider the fact that the "Organizations" were made up of individual corporate entities. Such treatment of its members as singular units known by the name of their principals, illustrates the fact that membership in Pro Net was intended to benefit and bind all of an organization's individual entities.

The record reveals that the Stewart Organization and West Palm, accepted the benefits of Pro Net membership by purchasing BSMs to which they otherwise would not have had access from Global. The record also shows that in 1998, the Stewart Organization purchased from Global: 23,879 books, 111,014 items of literature, and 6,101 videos for a total of 140,994 orders; that in 1999, the Stewart Organization purchased from Global: 66,023 books, 86,120 items of literature, and 16,858 videos for a total of 169,001 orders; that in 2000, the Stewart Organization purchased from Global: 38,832 books, 17,724 items of literature, 6,492 videos, and 9,141 disks for a total of 72,189 orders; that in 2001, the Stewart Organization purchased from Global: 17,132 books, 8,604 items of literature, 2,010 videos, and 733 disks for a total of 28,479 orders; and, that in 2002, the Stewart Organization purchased from Global: 19 audiobooks, 1,165 compact disks, 4,710 books, 2,608 items of literature, 431 videos, and 127 disks for a total of 9,060 orders. From 1998 to November of 2002, the Stewart Organization purchased 1,556,325 audiotapes alone through Global and realized $6,758,842.90 in "distributable profit" from such sales.

The Stewart Organization and West Palm also utilized the Pro Net website; listed over seventy of their own BSMs for sale in the Global catalogue distributed to Pro Net members; and, Stewart personally attended Pro Net functions and served on its Steering Committee.

Not only was Stewart the principal of both Nitro and West Palm, but the two entities were run as a single unit. As previously set out, Respondents stated in their petition that West Palm "operated in tandem with Nitro to build, support and enhance Stewart Associates' Amway business." As a general rule, "[a] party is estopped from denying its obligation to arbitrate when it receives a 'direct benefit' from a contract containing an arbitration clause." *Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2nd Cir. 1999) (holding that the owners of a ship were estopped

from denying the applicability of an arbitration provision in a contract between the shipbuilder and an entity that certified the ship as safe and seaworthy, where the owners received the direct benefits of lower insurance rates and the ability to sail under the French flag); *see also E.I. Dupont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 200 (3rd Cir. 2001) (holding that "[g]enerally, these cases involve non-signatories who, during the life of the contract, have embraced the contract despite their non-signatory status but then, during litigation, attempt to repudiate the arbitration clause in the contract").[21] Based on the foregoing, West Palm is estopped from refusing to arbitrate its dispute in accordance with the arbitration provisions set out in the Pro Net Terms and Conditions.[22]

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[21] Nevertheless, a party must receive a "direct benefit" from a contract containing an arbitration provision, as opposed to an "indirect" benefit. In *Thomson-CSF, S.A., v. Am. Arbitration Assoc.*, 64 F.3d 773, 778 (2nd Cir. 1995), Rediffusion, a company in the business of building flight simulators, entered into a "Working Agreement" containing an arbitration clause with Evans & Sutherland Computer Corporation ("E & S") to purchase computer-generated image equipment exclusively from E & S. In return, E & S agreed to supply its imaging equipment only to Rediffusion. *Id.* at 775. Subsequently, Thomson-CSF ("Thomson") acquired Rediffusion and E & S sought to bind Thomson to the Working Agreement. *Id.* As a result, Thomson sought a declaration that it was not bound under the Working Agreement. *Id.* The Second Circuit determined that "[h]ad Thomson *directly* benefitted [sic] from the Working Agreement by seeking to purchase equipment from E & S or enforcing the exclusivity provisions of the Agreement, it would be estopped from avoiding arbitration." *Id.* at 779. The appellate court noted, however, that the "benefit which E & S asserts, derives directly from Thomson's purchase of Rediffusion, and not from the Working Agreement itself; Thomson received no benefit at all from the Working Agreement (as opposed to the acquisition). Thus, Thomson [was] not bound by its subsidiary's arbitration agreement . . . ." *Id.* at 779.

[22] Pursuant to our finding that West Palm is equitably estopped from denying the arbitration clause in the Pro Net agreement, we will not address Appellants' third-party beneficiary theory.

We reiterate that "[a] dispute must be arbitrated if . . . the dispute falls within the scope of th[e] agreement." *Getz*, 71 S.W.3d at 229; *see Lyster v. Ryan's Family Steak Houses, Inc.*, 239 F.3d 943, 945 (8th Cir. 2001). In the instant matter, the Pro Net arbitration clause required arbitration of

> [a]ny dispute, controversy, or claim arising out of, relating to, or concerning the interpretation or performance of the contract created by acceptance of the Membership Application, or the breach thereof, or any dispute, controversy, or claim between one or more members of the Association or between the Association and any of its members . . . .

A general provision for the arbitration of "[a]ny dispute, controversy, or claim," such as that found in the Pro Net clause, "covers every breach, regardless of importance, that is asserted and denied . . ." *McCarney*, 866 S.W.2d at 889.

Respondents' claims come within the substantive scope of the Pro Net arbitration clause. First, the clause covers all issues arising between "one or more members of the Association or between the Association and any of its members . . . ." Here, thirteen of the eighteen named Appellants are either members of Pro Net or members of organizations with Pro Net membership and, as found above, Nitro is a member of Pro Net.[23] Accordingly, the disputes at issue are between "members of the Association" as stated in the arbitration clause. Second, the Pro Net clause covers all issues "arising out of, relating to, or concerning the interpretation or performance of the contract created by acceptance of the [Pro Net] Membership Application . . . ." In this case, all of Respondents' claims relate to the interpretation and the performance of the relationship between Pro Net, Nitro, and West Palm within the parameters of the Pro Net Membership

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[23] It appears that of the eighteen named Appellants, only Global, Brindley, Pro Net Profit, and Blanchard were not actual members of Pro Net.

Application. As a result, these claims fall squarely within the scope of the arbitration provision.

The trial court erred in failing to compel Nitro and West Palm to arbitrate pursuant to the arbitration clause set out in the Pro Net agreement. Appellants' first point is granted.

In Appellants' original Motion to Compel Arbitration, Appellants set out that "all of the claims asserted in this action by [Respondents] are subject *to one or more binding arbitration agreements*." (Emphasis added). Based on our finding that the parties are bound by the Pro Net arbitration provision, and Appellants' argument that the parties were subject "to one or more" arbitration clauses, this Court need not address Points II and III. Appellants' first point on appeal is dispositive.

The trial court in this matter was required to grant Appellants' motion to compel arbitration under the Pro Net arbitration clause and was also required to stay litigation during this process. The trial court's failure to do so was error. *See Duggan*, 920 S.W.2d at 208. The order of the trial court denying Appellants' motion to compel arbitration and stay litigation is reversed, and the cause is remanded to the trial court for further proceedings and the entry of an order consistent with this opinion.

Robert S. Barney, Judge

SHRUM, J. - CONCURS

BATES, C.J. - CONCURS

APPENDIX C

STATE OF MISSOURI
CIRCUIT COURT, 31ST JUDICIAL CIRCUIT

GREENE COUNTY COURTHOUSE
SPRINGFIELD, MISSOURI 65802
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IN RE: NETCO, INC. ET AL VS. DUNN, ET AL.
101CC0075

NITRO DISTRIBUTING, INC. ET AL. V. DUNN, ET AL.
101CC4530

Dear Attorneys:

These matters pend in my Court on several Defendant's Motions to Stay Proceedings and Compel Arbitration. I have read the comprehensive briefs of the parties and I have also studied the wonderfully detailed Opinion by Judge Haldane Taylor of the Fourth Judicial Circuit of Florida (he seems to be a judge with a relatively light trial docket or a couple of good law clerks).

I am inclined to say that I agree with many of the conclusions he reaches in his Findings of Fact and Conclusions of Law and I note that the arguments made there are quite similar to those made in my case. I suppose I agree with his analysis on most of the issues with the possible exception of his characterization of a number of the separate organizations as being basically the same because they were owned by the same people.

An issue, however, that keeps coming back to my mind as an old arbitrator myself, is one which Judge Taylor did not address. It has to do with the nature of the arbitration procedure itself. I am not particularly offended by the fact that the Amway arbitrators are trained in Amway procedures and that the Amway arbitration process is confined to this group. What is absolutely offensive is the fact that board members, some of whom are actual parties to this litigation, have veto power over the retention of these arbitrators in their jobs. That, coupled with the fact that Amway is not bound by its own arbitration requirements and the fact that all proceedings are held in secret leads me to believe that the Amway arbitration provision are, both substantively and

procedurally unconscionable. Irrespective of the arguments about who signed which agreements and when they came into effect, I simply could not require anyone to arbitrate any of these issues under a system that is so fundamentally unfair.

For these reasons, I am denying the Motions to Stay Proceedings and Compel Arbitration. As I indicated earlier, it is now my intention to order all the parties to mediate this case and to do so within ninety (90) days. I hasten to add that my conclusions in this regard predated this most recent flurry of activity and my decision to order mediation is based on my perceptions which I conveyed to all of you and not on any suggestions by any of the attorneys regarding the current litigation in St. Joseph.

Since this ruling favors Mr. Boulware, I will ask him to prepare an order for my signature consistent with this letter and to distribute it to other attorneys for their approval as to form.

Very truly yours,

/s/ J. MILES SWEENEY

JMS/ss

IN THE CIRCUIT COURT OF
GREENE COUNTY, MISSOURI

Case No. 101CC0075

NETCO, INC., et al.,

Plaintiffs,

vs.

JIMMY V. DUNN, et al.,

Defendants.

Case No. 101CC4530

NITRO DISTRIBUTING, INC., et al.,

Plaintiffs,

vs.

JIMMY V. DUNN, et al.,

Defendants.

ORDER

NOW, on this 22nd day of January, 2004, it is ORDERED that, after consideration, Defendants' Motion to Compel Arbitration and Stay Litigation and Defendants' Motion for Rehearing are hereby denied. The Court orders the parties to mediate the case within ninety (90) days unless a timely appeal or writ is filed in regard to this determination.

/s/ J. MILES SWEENEY, Circuit Judge - Division 2

APPENDIX D

The Federal Arbitration Act, 9 U.S.C. §§1-16 (2000)
(Pertinent Provisions)

Section 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Section 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement

for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. . . .

APPENDIX E

IN THE CIRCUIT COURT OF
GREENE COUNTY, MISSOURI
DIVISION NO. 2

[Filed March 21, 2003]

Case No. 101CC4530-2

NITRO DISTRIBUTING, INC., et al.,
Plaintiffs,

v.

JIMMY V. DUNN, et al.,
Defendants.

DEFENDANTS' SUPPLEMENTAL SUGGESTIONS IN SUPPORT OF MOTION TO COMPEL ARBITRATION AND STAY LITIGATION

* * * *

1. **Plaintiffs' Arguments of Fraudulent Inducement, Failure of Consideration, Economic Duress and that Pro Net "Is a Sham" Must Be Decided by the Arbitrators.**

Further, the agreement provides for the application of the American Arbitration Association Commercial Arbitration Rules in effect at the time of the dispute. Rule 8 of the American Arbitration Association's Commercial Rules provides:

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

(Affidavit of Jocelyn Learned, Ex. A at Vol. III, Tab K ("Learned Aff.")) (emphasis added). When parties incorporate this Rule into their arbitration agreement through the AAA Rules, it is a clear and unmistakable manifestation that the arbitrators, not the Court, are to decide matters of arbitrability even beyond the Prima Paint issues, such as whether the subject matter of the dispute is subject to arbitration. E.g., Sleeper Farms v. Agway, Inc., 211 F. Supp. 197, 200 (D. Maine 2002); Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners, Inc., 203 F.R.D. 677, 685 (S.D. Fla. 2001) aff'd, 312 F.3d 1349 (11th Cir. 2002); Lucile Packard Children's Hosp. and Stanford Hosp. Clinics v. U.S. Nursing Corp., 2002 WL 1162390 (N.D. Cal. 2002); Professional Sports Tickets & Tours v. Bridgeview Bank Group, 2001 WL 1090148 (E.D. Pa. 2001).

* * * *

APPENDIX F

IN THE CIRCUIT COURT OF
GREENE COUNTY, MISSOURI
DIVISION NO. 2

Case No. 101CC4530

NITRO DISTRIBUTING, INC., et al.,
Plaintiffs,

vs.

JIMMY V. DUNN, et al.,
Defendants.

Case No. 101CC0075

NETCO, INC., et al.,
Plaintiffs,

vs.

JIMMY V. DUNN, et al.,
Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFFS' SUPPLEMENTAL SUGGESTIONS IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL ARBITRATION

* * * *

Plaintiffs attempt to avoid their obligation to arbitrate by alleging that the Amway Rules of Conduct ("Amway Rules") and the separate Pro Net Membership Agreement are illegal contracts because they violate the antitrust laws. Significantly, all of these allegations relate to the contracts as a whole, not the arbitration provisions alone. In these circum-

stances, Prima Paint dictates that these issues are for the arbitrator to decide. See Prima Paint, 388 U.S. at 402-04 (holding that where alleged illegality is directed toward the contract as a whole rather than exclusively toward the arbitration clause, the issue must be decided by the arbitrator). Such a result is consistent with the clear and unmistakable intent of the parties. As explained below, the arbitration provisions contained in the Pro Net Membership Agreement and in the Amway Rules all unambiguously reserve questions of contract validity to the arbitrator, not the Court. Under the Federal Arbitration Act, 9 U.S.C. § 1 et seq. ("FAA") which applies to this case,[2] parties have the right to determine the scope of the arbitration agreement and the courts must respect that right. See AT&T Tech., Inc. v. Communications Workers of Am., 475 U.S. 643, 649 (1986).

* * * *

II. Plaintiffs Are Required To Arbitrate Their Claims Under the Amway Rules and Pro Net Membership Agreement

The arbitration provisions set forth in both the Amway Rules and the Pro Net Membership Agreement require Plaintiffs to arbitrate their claims. Plaintiffs do not challenge the validity of these arbitration provisions in their Supplemental Brief. Instead, Plaintiffs solely attack the entirety of the contracts containing the arbitration provisions by alleging antitrust violations.

This Court should reject Plaintiffs' new arguments for two reasons: (1) the Supreme Court's decision in Prima Paint is controlling and establishes that courts are only to consider issues that specifically go to the validity of the arbitration

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[2] Where, as here, the subject matter of a dispute "'involves commerce' . . . application of the Missouri [Arbitration] Act is preempted by the" FAA). Duggan v. Zip Mall Serv., Inc., 920 S.W.2d 200, 203 (Mo. App. 1996).

provision itself, not to the contract as a whole; and (2) the arbitration provisions in both the Amway Rules and the Pro Net Membership Agreement demonstrate that the parties clearly intended for an arbitrator, not the courts, to decide matters relateing to the existence, validity, interpretation, or scope of the contract. In light of such a clear and unambiguous expression of the parties' intent, the matters raised by Plaintiffs are for an arbitrator to decide.

* * * *

B. Plaintiffs' Efforts To Avoid Prima Paint Are Unavailing

* * * *

In Central Missouri Paving Company v. United Mine Workers of America, 749 F. Supp. 973, 977 (ED. Mo. 1990), the plaintiff alleged that an arbitration agreement contained in a collective bargaining agreement was unenforceable because the collective bargaining agreement was void. Id. at 974, 977. There, as here, the plaintiff's argument concerned the validity of the contract as a whole, not the arbitration provision in particular. Citing Prima Paint, the United States District Court for the Eastern District of Missouri rejected the plaintiff's efforts to avoid arbitration: "[t]he Company's contention concerns the validity of the entire contract rather than the arbitration provisions. As a matter of first impression, they are, therefore, issues for the arbitrator's consideration and not for the Court." Id. at 977 (citations omitted) (emphasis added). Similarly, in Three States Truckings, Inc. v. ARCO Leasing Corp., 470 F. Supp. 1075 (ED. Mo. 1979), the plaintiff argued that because the arbitrator found that there was no consideration to support the agreement between the parties, the arbitrator's award was void because the lack of a valid agreement negated the arbitrator's authority to render a decision. Id. at 1076. The district court rejected this argument: "Arco's own form signed by plaintiffs, recited that the

arbitrator hear 'Any controversy or claim arising out of or relating to this contract, or the breach thereof . . . .' That broad arbitration clause grants the arbitrator authority to decide questions concerning the validity of the contract as a whole." Id. at 1076-77 (citing Prima Paint, 388 U.S. at 404) (emphasis added). As explained below, here each of the arbitration agreements provide that the validity of the agreement itself is a matter for the arbitrator. Accordingly, any question regarding the validity of the agreements themselves is for the arbitrator—not this Court—to decide.

C. Plaintiffs Have Agreed That Any Disputes Relating To The Existence Or Validity Of The Contract Will Be Decided By Arbitration

The FAA envisions that parties may agree to arbitrate issues such as contract validity that would otherwise be before the courts. 9 U.S.C. § 2. The Supreme Court has recognized that the issue of whether a dispute is subject to arbitration "is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 83 (2002) (quoting AT&T Tech., 475 U.S. at 649 (emphasis added)); see also First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944-45 (1995). The Eighth Circuit has followed this approach and has recently affirmed that parties may agree that arbitrators, not the courts, may decide issues of arbitrability. See Bailey v. Ameriquest Mortgage Co., 346 F.3d 821 (8th Cir. 2003) (holding that an arbitrator has authority in the first instance to decide statutory claims where such claims are encompassed by the arbitration agreement).

There can be no serious argument that Plaintiffs have "clearly and unmistakably" agreed to arbitrate their current allegations of antitrust violations under the Pro Net Membership Agreement and the Amway Rules. The Pro Net Membership Agreement provides for arbitration to be administered by the AAA. The AAA Rules specifically provide that

issues of contract validity, enforcement, and scope are to be decided by the arbitrator. Indeed, the Pro Net Membership Agreement expressly provides for the application of the AAA Commercial Arbitration Rules ("AAA Rules") in effect at the time of the arbitration. Rule 8 of the AAA Rules states, in relevant part:

> (b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

(Affidavit of Jocelyn Learned, Ex. A at Vol. III, Tab K contained in Defendants' Appendix of Exhibits to Defendants' Motion to Compel Arbitration filed March 21, 2003) (emphasis added). Rule 8 has been held to be a "'clear and unmistakable' delegation of scope-determining authority to an arbitrator." Sleeper Farms v. Agway, Inc., 211 F. Supp. 2d 197, 200 (D. Maine 2002) (citing Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. MedPartners, Inc., 203 F.R.D. 677, 685 (SD. Fla. 2001) aff'd 312 F.3d 1349 (11th Cir. 2002); see also Lucile Packard Children's Hosp. and Stanford Hosp. Clinics v. U.S. Nursing Corp., 2002 WL 1162390 (N.D. Cal. 2002); Professional Sports Tickets & Tours v. Bridgeview Bank Group, 2001 WL 1090148 (E.D. Pa. 2001). Accordingly, when parties incorporate this Rule into an arbitration agreement, it unambiguously demonstrates the parties' intent to have arbitrators, not the Court, decide matters of arbitrability—including contract validity.

The Amway Rules similarly provide for arbitration administered by JAMS under the JAMS Rules. Both the Amway Rules and the JAMS Rules each contain a rule nearly identical to Rule 8. Like the AAA rule, the Amway Rules provide:

> disputes over the existence, validity, interpretation or scope of the agreement under which arbitration is sought, may be submitted to and ruled on by the Arbitrator, unless the relevant law requires that a court make such determination.

(Affidavit of Ken Stewart, Ex. 2 at Vol. II, Tab K, F-97-98 contained in Plaintiffs' Suggestions in Opposition to Defendants' Motion to Arbitration filed March 20, 2003) (emphasis added). Rule 11 of the JAMS Comprehensive Arbitration Rules & Procedures states:

> (c) Jurisdictional and arbitrability disputes, including disputes over the existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator, has the authority to determine jurisdiction and arbitrability as a preliminary matter.

(*See* Rule 11, JAMS Comprehensive Arbitration Rules & Procedures (emphasis added).) Plaintiffs, therefore, have explicitly agreed that any dispute related to the validity of these agreements is for an arbitrator—not this Court—to decide.

* * * *

VI. Conclusion

For the foregoing reasons stated herein, Plaintiffs are bound to arbitrate their claims under the Amway Rules which incorporate the JAMS Arbitration Rules, and under the Pro Net Membership Agreement which incorporates the AAA Arbitration Rules. In their Supplemental Brief, Plaintiffs have presented nothing to overcome the strong presumption in favor of arbitration. Accordingly, Defendant's Motion to Compel Arbitration should be granted and Plaintiffs should be required to arbitrate the issues in this case.

APPENDIX G

IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

NO. SD26063

NITRO DISTRIBUTING, INC., ET AL.,
Plaintiffs-Respondents,
vs.
JIMMY V. DUNN, ET AL.,
Defendants-Appellants.

APPEAL FROM THE CIRCUIT COURT OF
GREENE COUNTY, MISSOURI
HONORABLE J. MILES SWEENEY
CIRCUIT COURT JUDGE
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CASE NO. 101CC4530

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2. The Arbitration Clause in the Pro Net Terms and Conditions Covers Plaintiffs' Dispute With Defendants

* * * *

Applying the rules of construction required by the FAA, this Court should conclude that the arbitration clause covers Plaintiffs' claims against all Defendants, because they are claims "relating to, or concerning the interpretation or performance of the contract" created by Pro Net membership. (A0440.) In so doing, the Court should follow the reasoning of the Circuit Court of Duval County, Florida, which held last year that the arbitration clause of the Pro Net Terms and Conditions requires arbitration of exactly the same types of claims alleged here by Plaintiffs. *See U-Can-II, Inc.*, No. 02-2535-CA CV-B (A3542-60). In that case, a Pro Net member sued most of the same defendants involved in the present case, making virtually identical allegations that they conspired to utilize Pro Net as a vehicle for depriving the plaintiff of the financial benefits of its "tool" business. The Florida court properly held that "the gist of [the Plaintiff's] claims is that the Defendants used Pro Net to take its BSM business, a subject matter that *clearly is within the scope of the Pro Net arbitration clause*." (A3690 (emphasis added).)[8]

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[8] The dispute must be submitted to arbitration even if the Plaintiffs could raise a legitimate challenge concerning the scope of the agreement, which they cannot. That is because the parties have agreed that any questions as to the agreement's scope must be resolved by the arbitrator. The parties certainly have authority to reserve issues concerning the scope of an arbitration agreement for the arbitrator to decide (*see, e.g., Washington-Baltimore Newspaper Guild v. Washington Post*, 959 F.2d 288, 291-92 (D.C. Cir. 1992)), and they did so here. Because the Pro Net arbitration agreement utilizes the AAA arbitration rules (*see* A0440), those rules are deemed to be incorporated within the agreement. *See, e.g.* AAA Rule 1(a) (when the parties agree to AAA arbitration, they are

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2. The Arbitration Clause in the Amway Distributor Agreement Covers Plaintiffs' Dispute With Defendants

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Third, Plaintiffs' claims arise out of or relate to the Amway Rules of Conduct. *See U-Can-II*, No. 02-2535-CA CV-B at 14. (A3555.) Plaintiffs assert, among other things, that Defendants circumvented the "prescribed" lines of sponsorship. These allegations directly involve several of the Amway Rules of Conduct. For example, Rule 4.14 governs the sale of non-Amway products, specifically including BSMs, and provides that no distributor who "sells literature of sales not produced by [Amway], or who sells services . . . will induce another [distributor] whom he has not personally registered to sell such products, literature, sales aids or

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deemed to have incorporated those Rules into their arbitration agreement); *Varley v. Tarrytown Assocs.*, 477 F.2d 208, 210 (2d Cir. 1973) (clause requiring AAA arbitration incorporates AAA Rules into agreement). The AAA Rules require the arbitrator to decide "any objections with respect to the existence, scope or validity of the arbitration agreement." AAA Commercial Arbitration Rule 7(a), *available at* http://www.adr.org. This Court therefore should follow the holdings of numerous other courts and hold that the parties' reliance on the AAA rules requires that an arbitrator must resolve any questions as to the scope of the arbitration agreement. *See, e.g., Prof'l Sports Tickets & Tours, Inc. v. Bridgeview Bank Group*, No. Civ. A. 01-991, 2001 WL 1090148 at *5 (E.D. Pa. Sept. 13, 2001) (if AAA Rules are adopted by the parties, "it is for the arbitrator, and not th[e] court, to decide whether the parties have an agreement for arbitration that encompasses the dispute between them"); *Sleeper Farms v. Agway, Inc.*, 211 F. Supp. 2d 197, 200 (D. Me. 2002) (former AAA Rule 8, now AAA Rule 7(a), is "a 'clear and unmistakable' delegation of scope-determining authority to an arbitrator") (citation omitted); *Lucile Packard Children's Hosp. v. U.S. Nursing Corp.*, No. 02-0192 MMC, 2002 WL 1162390, at *3 (N.D. Cal. May 29, 2002) (arbitration agreement governed by AAA rules submits question of arbitrability to the arbitrator).

services, or shall he or she offer to sell such products, literature, sales aids or services to any [distributor] except those personally registered by him." (A1633.) Rule 7, entitled "Business Support Materials," directs that distributors "who choose to sell, purchase or utilize such BSM[s] must comply with this Rule," and states that Amway can review BSMs "for the determination of compliance with its Rules of Conduct and business practices and policies." (A1648.) Rule 7 goes on to list Amway's limitations on content, distribution and sales of BSMs, and authorizes Amway to require distributors to submit their BSM materials for Amway review. (A1649-1651.) Rule 5.1.1 requires that sponsor distributors train and supply their downlines: "In the event that a Sponsor fails to personally train and supply his or her [distributor], or if suitable arrangements are not made to provide such services, the rights to any [distributors] whom he or she may have registered shall pass up to the next Sponsor in his or her Line of Sponsorship in accordance with Rule 6.11." (A1635.) Rule 6 deals with the "Preservation of the Line of Sponsorship." (A1638.) Thus, Plaintiffs' claims obviously arise out of, or at a minimum relate to, the Amway Rules of Conduct.[14]

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[14] Furthermore, even if there were any question that the parties' dispute fits within the scope of the arbitration clause, it would be the arbitrator's responsibility to resolve the issue. The arbitration provisions in the Amway Rules of Conduct state that "[j]urisdictional and arbitrability disputes, including disputes over the existence, validity, interpretation or scope of the agreement under which Arbitration is sought, may be submitted to and ruled on by the Arbitrator." (A1590-91; *see also* A1661.) Additionally, the Amway Rules mandate JAMS/Endispute arbitration, (A1591; *see also* A1661), and JAMS/Endispute also has Comprehensive Arbitration Rules and Procedures. Rule 11(c) of the JAMS rules provides that "[j]urisdictional and arbitrability disputes, including disputes over the existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter." JAMS Comprehensive Arbitration Rule 11 (c), *available at*

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4. The Defenses to Arbitrability That Plaintiffs Raised Below Should be Resolved by an Arbitrator and Not by the Court

In the Circuit Court, Plaintiffs raised numerous defenses challenging the validity and enforceability of the Amway distributor agreement. It is well established that the arbitrator is solely responsible for resolving such issues in a contract that contains an arbitration clause, because the issues go to the merits of the parties' dispute. *See, e.g., Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (not only is alleged "waiver, delay, or a like defense to arbitrability" to be presented to the arbitrator, but also "prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate" are for the arbitrator to decide); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 402-04 (1967) (arbitrator must resolve claim for fraud in the inducement of a contract containing arbitration clause); *St. Paul Fire & Marine Ins. Co. v. Courtney Enter., Inc.*, 270 F.3d 621, 624-25 (8th Cir. 2001) (claim of fraud in the inducement of contract with arbitration clause "goes to the merits" and is for the arbitrator); *Houlihan v. Offerman & Co., Inc.*, 31 F.3d 692, 696 n.5 (8th Cir. 1994) (defense of failure of consideration "applies to the contract as a whole" and is for the arbitrator); *Creson v. Quickprint of America, Inc.*, 558 F. Supp. 984, 987-88 (W.D. Mo. 1983) (duress is "of the same remedial character" as fraud in the inducement, and therefore should be decided by the arbitrator); *Hall v. Prudential-Bache Sec., Inc.*, 662 F. Supp. 468, 471 & n.1 (C.D. Cal. 1987) ("[c]laims concerning duress, unconscionability, coercion, or confusion in signing should be determined by an arbitrator because those issues go to the formation of the contract"); *Coleman v. Prudential Bache*

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http://www.jamsadr.com/rules/comprehensive.asp.

Sec., Inc., 802 F.2d 1350, 1352 (11th Cir. 1986) ("[c]laims alleging unconscionability, coercion, or confusion in signing the agreement" go the formation of the entire contract and are for the arbitrator).

The public policy favoring arbitration also requires that Plaintiffs' many and varied attacks on the Amway distributor agreement should be addressed by the arbitrator rather than the Court. *See Hawkins v. Aid Ass'n for Lutherans*, 338 F.3d 801, 806-07 (7th Cir. 2002), *cert. denied*, 124 S. Ct. 1146 (2004) (all questions unrelated to existence or scope of arbitration agreement, including unconscionability claims, are for the arbitrator); *Bob Schultz Motors, Inc.*, 334 F.3d at 726 (when parties have contracted to arbitrate, claims beyond those pertaining to the existence of the contract should be addressed to the arbitrator). As a guiding principle, "a court compelling arbitration should decide only such issues as are essential to defining the nature of the forum in which a dispute will be decided," as such matters can be addressed by the arbitrator, or in a challenge to an arbitral award. *Larry's United Super, Inc. v. Werries*, 253 F.3d 1083, 1085 (8th Cir. 2001) (quotations omitted). Accordingly, "[o]nce a dispute is determined to be validly arbitrable, all other issues are to be decided at arbitration." *Id.* at 1086 (quoting *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 230 (3d Cir. 1997)).

* * * *

APPENDIX H

IN THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT

NO. SD26063

NITRO DISTRIBUTING, INC., ET AL.,
Plaintiffs-Respondents,
vs.
JIMMY V. DUNN, ET AL.,
Defendants-Appellants.

APPEAL FROM THE CIRCUIT COURT OF
GREENE COUNTY, MISSOURI
HONORABLE J. MILES SWEENEY
CIRCUIT COURT JUDGE
GREEN COUNTY CIRCUIT COURT
CASE NO. 101CC4530

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A. The Parties are Bound by the Arbitration Clause in the Pro Net Terms and Conditions

1. Respondents' Defenses to Arbitration go to the Formation of the Pro Net Contract as a Whole and Therefore are Issues for the Arbitrator, not the Court, to Decide

Appellants established in their opening brief that the Court has the responsibility to determine that there is an arbitration agreement. This responsibility is satisfied when the Court confirms that there has been a *prima facie* showing that the agreement exists. *E.g., Apollo Computer, Inc. v. Berg*, 886 F.2d 469, 473 (1st Cir. 1989). Appellants easily satisfy that standard by pointing to the Pro Net agreement. (A0436-40.) As a result, when Respondents discuss the Pro Net agreement, the thrust of their arguments is to raise *defenses* to the agreement introduced into the record below, and *not* to dispute that there is *prima facie* evidence of an arbitration agreement. In particular, Respondents argue that the Pro Net agreement is not enforceable as to Nitro and fifteen of the Appellants because (1) they allegedly lacked the capacity to contract, because they allegedly did not satisfy the Pro Net membership requirements; and (2) Pro Net allegedly failed to confirm the contract in writing. (*See* Resp. Br. at 56-61, 70-78.) As a threshold matter, this Court should apply the *Prima Paint* doctrine and conclude that the arbitrator must decide such defenses. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). That doctrine provides that the arbitrator must decide *any* contract defense that is not directed specifically and exclusively to the arbitration provision. (App. Br. at 61-63; *see also Madol v. Dan Nelson Auto. Group*, 372 F.3d 997, 999-1000 (8th Cir. 2004)). Respondents' defenses fall into that category, because they challenge the enforceability of the Pro Net agreement as a whole.

Respondents understandably wish to limit the application of the *Prima Paint* doctrine, but their arguments ignore the federal policy favoring arbitration agreements. *E.g., Fru-Con Constr. Co. v. Southwestern Redev. Corp. II*, 908 S.W.2d 741, 744 (Mo. Ct. App. 1985). In addition, Respondents are incorrect that the Supreme Court "rejected the broad interpretation of *Prima Paint*" in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002). (Resp. Br. at 136.) In fact, *Howsam* did not even cite *Prima Paint* and held that an arbitrator must decide arbitrability under the facts there presented. 537 U.S. at 84-85. Further, other courts have rejected the Ninth Circuit precedent upon which Respondents rely for their "void/voidable" distinction. *E.g., S. Carolina Pub. Serv. Auth. v. Great W. Coal (Ky.), Inc.*, 437 S.E.2d 22, 24 (S.C. 1993) (citing cases).

Finally, Respondents' contractual defenses must be submitted to arbitration under the express terms of the Pro Net agreement. The parties to a contract are free to agree to arbitrate any and all disputes. *See, e.g., First Options of Chicago v. Kaplan*, 514 U.S. 938, 943 (1995); *Howsam*, 537 U.S. at 83. The Pro Net agreement provides that the American Arbitration Association Commercial Arbitration Rules apply. (A0440.) These Rules, in turn, state that the arbitrator has the power to determine the "validity of a contract of which an arbitration clause forms a part." AAA Commercial Arbitration Rules, Rule 7(b), *available at* http://www.adr.org. The Court should therefore require arbitration of Respondents' defenses. *See, e.g., Prof'l Sports Tickets & Tours, Inc. v. Bridgeview Bank Group*, No. Civ. A. 01-991, 2001 WL 1090148, at *5 (E.D. Pa. Sept. 13, 2001).

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C. The Transition-to-Pro Net Arbitration Agreement Covers Respondents' Claims

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First, even if there were any doubt about the meaning of "any and all" in the clause, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983).

Second, the Transition-to-Pro Net arbitration agreement expressly states that arbitration will be conducted pursuant to JAMS/Endispute rules. (A0441-42.) Rule 11(c) of those rules provides that disputes over the "scope of the agreement under which Arbitration is sought . . . shall be submitted to and ruled on by the Arbitrator." JAMS Comprehensive Arbitration Rules, Rule 11(c), *available at* http://www.jamsadr.com/rules/comprehensive.asp.

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APPENDIX I

IN THE SUPREME COURT OF MISSOURI

NO. SC86854

NITRO DISTRIBUTING, INC., ET AL.,
Respondents,

v.

JIMMY V. DUNN, ET AL.,
Appellants.

ON APPEAL FROM THE CIRCUIT COURT OF
GREENE COUNTY, MISSOURI

HONORABLE J. MILES SWEENEY
CIRCUIT COURT JUDGE

APPELLANTS' SUBSTITUTE OPENING BRIEF

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* * * *

A. The Amway System

Amway, a nonparty corporation, is a multi-level marketing business (now known as "Quixtar") that administers a worldwide network of independent distributors that sell consumer goods and products. (A0694.) These distributors (sometimes called Independent Business Owners, or "IBOs") sell Amway products directly to consumers. (A1625.) Their businesses grow through sales of Amway products and through the sponsorship of new distributors. (A0684.)

This framework is established by the Amway Rules of Conduct ("Rules of Conduct" or "Amway Rules") to which each Amway distributor must subscribe in its initial "Distributor Application." (A0433-34; A1623.) By signing this form, a distributor agrees to "comply with the Amway Sales and Marketing Plan as set forth in official Amway literature and to observe the spirit as well as the letter of the Amway Code of Ethics and Rules of. Conduct." (A2933.) Amway distributorships are renewed annually and always include this agreement. (A2927.)

The Amway Rules establish "lines of sponsorship" that create a network where a distributor has a position immediately below its sponsor and above any distributors that it subsequently sponsors. (A1618.) The network above a distributor is its "upline" and the network below is its "downline." (A1616; A1622.)

* * * *

E. The Transition-to-Pro Net Agreement

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The agreement stated, *inter alia*: ***"The Parties hereby agree to submit . . . to final and binding arbitration with J.A.M.S./ENDISPUTE, in accordance with Rule 7 of the***

Amway/ADA Arbitration Rules and Procedures, any and all issues arising out of the transition of the Foley, Gooch, Childers, Stewart and Woods organizations from working with D&B Enterprises(, Inc[.] and InterNet Services to being responsible for the training and education of their distributor organizations." (A0441; emphasis added.)[6]

According to Respondents, in anticipation of the creation of Pro Net, "Nitro (Stewart) contributed to Global and/or Pro Net on consignment approximately $650,000 retail value of tapes and tools to stock the Pro Net warehouse in Florida. No other member of Pro Net contributed inventory or any significant cash to Pro Net's setup." (A0721.) "Following the shipment of Nitro's tapes and other tools to the Pro Net warehouse in Florida, Nitro closed its Missouri BSMs warehouse in or about August 1998." (A0722.) Thus, "with Nitro agreeing to join Pro Net," the "Stewart Organization's BSMs business" had been committed to Pro Net. (*Id.*)

F. The Pro Net Arbitration Provisions

In early 1998, the Pro Net Steering Committee, which included Mr. Stewart and the other founders (A2401-06), approved Terms and Conditions for membership that included the following two provisions:

First, paragraph 3 of the Pro Net Terms and Conditions required members to adhere to the Amway Rules of Conduct. (A0439 (Terms and Conditions); A0436 (Membership Application)). As discussed below, the Amway Rules were amended after a 1997 vote of distributors, including Mr. Stewart, recommended the adoption of binding arbitration. (A2911.)

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[6] JAMS arbitration is discussed more fully below in Point III. As noted above, Amway Rule 7 addresses BSMs. Amway Rule 11 sets out procedures for alternative disputes resolution. (A1624.)

Second, the St[illegible]g Committee adopted an arbitration clause specific to Pro Net. (*E.g.*, A2538-39.) As a result, the Pro Net application (A0437) and the Pro Net Terms (A0437) provide for the use of American Arbitration Association ("AAA") arbitration procedures. Pursuant to paragraph 11 of these terms, if mediation is unsuccessful, ***"[a]ny dispute, controversy, or claim arising out of relating to, or concerning the interpretation or performance of the contract created by acceptance of the Membership Application, or the breach thereof or any dispute, controversy, or claim between one or more members of the Association or between the Association and any of its members . . . . shall be submitted to and settled by binding arbitration administered by the [AAA] under its Commercial Arbitration Rules in effect at that time."*** (A0440; emphasis added.)

* * * *

I. Amway Distributor Arbitration

As noted above, in 1997, Amway incorporated an arbitration provision into its standard distributorship contract and the Amway Rules of Conduct. Under this provision, a distributor agrees, if mediation is unsuccessful, ***"to submit any remaining claim or dispute arising out of or relating to [the] Amway Distributorship, the Amway Sales and Marketing Plan, or the Amway Rules of Conduct (including any claim against another Amway distributor, or any such distributor's officers, directors, agents, or employees, or against Amway Corporation, or any of its officers, directors, agents or employees) to binding arbitration in accordance with the Amway Arbitration Rules, which are set forth in the Amway Business Compendium."*** (A0453; emphasis added.)

This provision was adopted after the unanimous recommendation of the Board of the Amway Distributors Association, which included Stewart. (A0784; A2410; A2488; A2911-29.) Amway then notified all distributors of the rule

change and announced it in the September 1997 issue of its monthly magazine for distributors, *Amagram*. (A0452.) The publication noted that "[t]his change incorporates an agreement to arbitrate all distributor disputes relating to the Amway business." (*Id*) Adjacent to this text was a photograph of Mr. Stewart in the company of Mr. Childers and Mr. Gooch. (*Id.*)

Amway also sent Mr. Stewart and other automatic renewal distributors an "Acknowledgement of Distributor Changes" to sign that acknowledged: "I HAVE READ AND AGREE TO ABIDE BY THE AGREEMENT STATED BELOW." (A0435 ¶ 19, Ex. 7.) Mr. Stewart signed his form on November 17, 1997. (*Id.*; A2930 ¶ 13, Ex. 7.) Each year since then the Stewart Associates distributorship has renewed its arbitration commitment. (*See* A2931 ¶ 16, Ex. 3.)

* * * *

E. Respondents' defenses to arbitrability should be resolved by an arbitrator

Finally, Respondents raised numerous defenses below that should be decided by an arbitrator instead of a court once the dispute is determined to be arbitrable. The FAA and the agreements themselves (through incorporation of specific arbitration rules) provide that a court's analysis should be limited to whether a valid agreement to arbitrate is applicable to this dispute. *See, e.g., Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002); *Bob Schultz Motors, Inc. v. Kawasaki Motors Corp., U.S.A.*, 334 F.3d 721, 726 (8th Cir. 2003); *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir. 2005).

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court reverse and remand with instructions staying this action pending arbitration under the Pro Net agreement

(pursuant to the AAA Commercial Arbitration Rules), the Transition-to-Pro Net agreement and the Amway Rules of Conduct.

APPENDIX J

PRO NET GLOBAL ASSOCIATION MEMBERSHIP APPLICATION

This Membership Application must be completed by all applicants (individuals, corporations, and other entities) for regular membership in Pro Net Global Association (the "Association"). The purpose of the Association is to promote the common business interests of its members engaged in distributing Amway products or services.

Member Benefits

Upon acceptance of this Membership Application, the Association will act to provide benefits for the undersigned applicant ("Member") by:

- Providing periodic information helpful in developing the members' Amway businesses.
- Acting on behalf of its members to negotiate certain purchase agreements.
- Making business support materials, services, marketing materials and other print or electronic literature available for purchase by members.
- Providing a forum for the sharing of ideas and suggestions for the improvement and continued growth of its members' Amway businesses.
- Promoting, arranging and sponsoring member meetings.

Member Obligations

Upon acceptance of this Membership Application by the Association, the Member agrees:

- To adhere to the Amway Corporation's Code of Ethics and Rules of Conduct for distributors, the Association's Bylaws, and the decisions of the Board of Directors and officers of the Association.

- To grant authority to the Association to negotiate for the purchase of business support materials on behalf of the Member.
- To refrain from using business support materials unless they have been approved by the Association.
- To serve on committees of the Association as requested by the Association.
- To be bound by the Terms and Conditions of this Membership Application as set forth on the attachment to this Application.

Copyrights

One of the Association goals is to benefit the undersigned Member and the Association membership generally by the collection and use of the materials of its members as a foundation for development of business support materials for the purchase, distribution and sale by all members. In order to accomplish this, by joining the Association, Member acknowledges that, pursuant to the Terms and Conditions incorporated in this Membership Application, Member is transferring and conveying all copyrights and other intellectual property rights in speeches, presentations, and related materials, and audio and videotapes of them, that have been previously given by the Member at past Amway events, and that are to be given at future Amway events. In addition to this protection, a Member will be permitted by the Association to give speeches and presentations at Amway events hosted by a non-Member of the Association and to duplicate and distribute audio and videotapes of them. Also, if a Member leaves the Association, upon request, the copyrights and other intellectual property rights will be returned to the Member by the Association.

Dispute Resolution

The Association recognizes that conflicts and disputes can occur in any association relationship. The Association is in-

tended to further the interests of its members and to address disputes fairly. Thus, the Association has put into place procedures to avoid litigation, and to encourage resolution of disputes among Amway distributors in the most private and cost-effective manner. Accordingly, by joining the Association, Member acknowledges that, pursuant to the Terms and Conditions incorporated in this Membership Application, Member is agreeing to participate and abide by Association dispute resolution procedures consisting of Association mediation procedures, and use of American Arbitration Association arbitration procedures if the dispute is not resolved through internal Association mediation.

PRO NET GLOBAL ASSOCIATION
MEMBERSHIP APPLICATION INFORMATION

The undersigned applicant agrees to abide by all Terms and Conditions of Association Membership:

MEMBER NAME: Ken Stewart/Nitro Distibuting

MEMBER ADDRESS: 4933 E. U S. Highway 60

City: Rogersville State: MO Zip 65742

MEMBER'S TAX IDENTIFICATION NUMBER

OR SOCIAL SECURITY NUMBER: 43-1494962

MEMBER'S ADA NUMBER: 1007898

TELEPHONE NUMBER: (417) 887-8100

FAX NUMBER: (417) 887-2203

AMVOX NUMBER: (417) 227-8000

MEMBER'S E-MAIL ADDRESS:

CONTACT PERSON: Tammy Hanafin

Title: Office Manager

Telephone Number: (417) 887-8100

Fax Number: (417) 887-2203

Amvox Address: (417) 227-8003

Signature: /s/ Ken Stewart

Name of person signing: Ken Stewart

Title: President-Nitro Distrib.

DATE: 7-3-98

PLEASE RETURN TO: Pro Net Global Association
6851 Distribution Ave., South
Jacksonville, Florida 32256

Please remit payment of the $25 initiation fee to Pro Net Global Association with the submission of this Membership Application. Annual dues are $20.

PRO NET GLOBAL ASSOCIATION
MEMBERSHIP APPLICATION
TERMS AND CONDITIONS

Upon acceptance of this Membership Application by the Pro Net Global Association ("Association"), a Delaware Association, the applicant ("Member') agrees and accepts the following terms and conditions of Membership incorporated in the Membership Application:

Membership, Obligations, and Benefits

1. This is an application for non-voting membership to the Association and does not constitute an offer of membership. This Membership Application will not be deemed accepted unless and until accepted by the Association in writing. You will be contacted by the Association upon the acceptance or rejection of this Membership Application. This Membership Application and its terms and conditions shall be governed by and construed in accordance with the laws of the State of Delaware, without reference to principles of conflicts of law.

2. Membership in the Association may be terminated for cause consistent with the Bylaws of the Association and also may be terminated if Member becomes ineligible for membership or is in default in the payment of dues.

3. Member agrees to adhere to the Amway Corporation's Code of Ethics and Rules of Conduct for distributors, the Association's Bylaws, and the decisions of the Board of Directors and officers of the Association.

4. Member grants authority to the Association to negotiate for the purchase of business support materials on behalf of the Member.

5. Member agrees to refrain from using business support materials unless they have been approved by the Association.

6. Member agrees to serve on committees of the Association as requested by the Association.

7. The Association will act to provide benefits to members by, among other things:

   a. Providing periodic information helpful in developing the members' Amway businesses.

   b. Acting on behalf of its members to negotiate certain purchase agreements.

   c. Making business support materials, services, marketing materials and other print or electronic literature available for purchase by members.

   d. Providing a forum for the sharing of ideas and suggestions for the improvement and continued growth of its members' Amway businesses.

   e. Promoting, arranging and sponsoring member meetings.

Copyrights

8. As it relates to any Amway Distributor Opens, Business Building Seminars and/or Conventions ("Event"), the Member:

   a. Represents that the undersigned Member is the owner of all right, title, and interest (as author, works for hire or by assignment) in and to all speeches, presentations and all related materials and audio or videotapes thereof ("Works") that the Member or any principal, employee or independent contractor of the Member has previously used or produced in connection with any past Event; that all such Works used or produced (or to be used or produced) at any past or future Event are (or will be) the independent creation of those individuals or of the Member, and that no other persons or entities participated (or will

participate) in the development of such Works, except to any extent that the Member has obtained or obtains any and all necessary transfers of rights and licenses to use such materials in connection with any Event and subsequent duplication thereof.

b. Agrees that with respect to all previously created Works presented and/or audio or videotapes thereof used or produced by the Member or any principal, employee or independent contractor of the Member at any past Event, the Member hereby assigns to the Association all of its worldwide right, title and interest in and to such past Works and any works in any medium derived from them, including but not limited to worldwide copyrights, including renewals and registrations therein, and other proprietary rights therein.

c. Agrees that all Works to be created in the future by the Member, or any of its principals, employees or independent contractors, including but not limited to presentations and related audio or videotapes and materials that the undersigned Member uses or produces in connection with them, shall constitute works made for hire, in which authorship and ownership rights vest in the Association; and further agrees, that to any extent, in whole or part, such future Works subject to this Agreement are determined by a court or other body interpreting or enforcing this Agreement not to constitute a work made for hire, this Agreement shall be read to effectuate the intent here-of to transfer all intellectual property rights in such future Works to the Association; and therefore, with respect to any future Works not deemed to be works for hire, the undersigned Member hereby assigns to the Association all of its worldwide right, title and interest in and to such

future Works and any works in any medium derived from them, including but not limited to the world-wide copyrights, including renewals and registrations therein, and other proprietary rights therein.

d. Agrees that the Association has permission to use the name, image, likeness, voice, photograph and/or biographical information of an individual Member and any principals and employees of a Member for the purposes of advertising or promoting any Event or any broadcast or transmission of such persons' appearances at any past or future Event, or the printed material or any audio or video tapes capturing, recording, or depicting such persons' appearance at any past or future Event; and represents that the undersigned Member is authorized by such persons to provide this permission on their behalf.

f. Agrees to execute, or cause to be executed by its principals and/or employees, in the future any necessary approvals, agreements, assignments, releases, or other documents to effectuate the intent as set forth in paragraphs (a) through (d) hereof.

9. Upon reasonable notice to the Association in writing, Member is authorized to give speeches or presentations, use related materials, and/or to authorize the audio or videotape duplication and distribution of them by others, and to retain proceeds from such event or duplication, at Amway events hosted by a non-member of the Association. The Member shall in such case make reasonable efforts to assure that any audio or videotape duplicates reflect any Association copyrights in an underlying speech or presentation.

10. Upon termination of Member's membership in the Association, upon written request to the Association and reasonable notice, the Association agrees to assign to the

then-former Member all worldwide right, title and interest in and to Works authored by the Member or created as a work for hire on behalf of the Association which are subject to Paragraph 8 hereof, including but not limited to the worldwide copyrights, including renewals and registrations therein, and other proprietary rights therein, in consideration for acknowledgement in writing of the Association's right, royalty free, to sell off all audio and videotapes and related materials featuring such Works in the Association's inventory, or in production under authorization of the Association, as of the date of the request.

Dispute Resolution

11. Any dispute, controversy, or claim arising out of, relating to, or concerning the interpretation or performance of the contract created by acceptance of the Membership Application, or the breach thereof, or any dispute, controversy, or claim between one or more members of the Association or between the Association and any of its members which cannot be resolved through negotiation (each, a "Dispute") shall be submitted to mediation administered by the Association. Each party to the dispute shall name a mediator who shall be an Association Member at the diamond level or higher of Amway. Upon the selection of two mediators, the two chosen mediators shall select a third mediator who shall be an Association Member at the diamond level or higher of Amway. If agreement is not reached by the parties by mediation, any Dispute shall be submitted to and settled by binding arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules in effect at that time, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction. Should any such arbitration relate to intellectual property issues, the arbitrator(s) shall be attorneys specializing in intellectual property law.

APPENDIX K

any and all issues arising out of the transition of the Fairy, Geach, Crider, Stewart and Woods organizations from working with D+B Enterprises Inc and InterNet Services to being responsible for the training and education of their distributer organizations.

In re:

ARBITRATION AGREEMENT

1. **Submission to Arbitration.**

The Parties hereby agree to submit ~~the above-captioned matter~~ to final and binding arbitration with J·A·M·S/ENDISPUTE, in accordance with Rule 7 of the Amway/ADA Arbitration Rules and Procedures.

The Arbitrator shall be selected in accordance with the Amway/ADA Arbitration Rules and Procedures.

2. **Disqualification of the Arbitrator and J·A·M·S/ENDISPUTE as Witness/Limitation of Liability**

The Parties shall not call the Arbitrator or any employee or agent of JAMS/ENDISPUTE as a witness or as an expert in any proceeding involving the Parties and relating to the dispute which is the subject of the arbitration, nor shall they subpoena any notes or other materials generated by the Arbitrator during the arbitration. The Parties further agree to defend the Arbitrator and J·A·M·S/ENDISPUTE and its employees and agents from any subpoenas from outside Parties arising out of this Agreement or arbitration.

The Parties agree that neither the Arbitrator nor J·A·M·S/ENDISPUTE, including its employees or agents, is a necessary Party in any proceeding involving the participants and relating to the dispute which is the subject of the arbitration. The Parties further agree that the Arbitrator and JAMS/ENDISPUTE, including its employees or agents, shall have the same immunity from liability for any act or omission in connection with the arbitration as judges and court employees would have under federal law.

By the signatures below, each participant, either directly or through counsel, certifies that it has read the entire Agreement and agrees with all matters stated herein.

3. **Fees**

Any arrangement for the compensation of an Arbitrator shall be made through the Case Administrator and not directly between the Parties and the Arbitrator. Payment of the Arbitrator's fees and expenses shall be made by the Case Administrator from the fees and moneys collected by the Case Administrator for this purpose.

A non-refundable case management filing fee of $300.00 shall be paid by the initiating Party or Parties at the time the matter is filed with the Case Administrator.

The professional fees for the first Hearing day shall be $2,900.00. This shall entitle the Parties to a full 8 hour day of Hearing time, and up to three hours of pre-Hearing or post-Hearing services by the Arbitrator which includes time for the preparation of the award. Additional Hearing time will be billed in half day increments (4 hours of Hearing time and up to 1.5 hours of pre or

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post-Hearing time) at the rate of $1450.00 per increment. Additional pre-Hearing or post-Hearing services will be billed in 1 hour increments at the rate of $300.00 per hour.

The Hearing fees described above do not cover the rental of Hearing rooms for Arbitrations that are conducted at non-JAMS/ENDISPUTE offices or when a fee is assessed to JAMS/ENDISPUTE. All costs relating to the rental of any facilities shall be divided equally among the Parties and will be billed upon scheduling. If the Hearing is rescheduled or canceled, any additional fees or refunds will be assessed equally among the Parties.

Unless otherwise agreed by the Parties, the expenses of witnesses shall be borne by the Party calling such witnesses. All expenses of the arbitration, including required travel and accommodations, travel time when applicable, and other expenses of the Arbitrator, Case Administrator representatives, and any costs relating to witnesses or any other proof produced at the direction of the Arbitrator, shall be borne as directed by the Arbitrator in the award.

The Case Administrator shall estimate the fees required for the Arbitration. As directed by the Case Administrator, the Parties shall deposit such sums of money necessary to cover the expenses of the Arbitration. The Case Administrator shall also have the authority to require a deposit for any necessary additional expenses related to the Arbitration. The Case Administrator shall apply the deposits as directed, and shall return any unexpended balance to the appropriate Party in a timely fashion.

If the professional or administrative fees have not been paid in full, the Case Administrator may so inform the Parties in order that one of them may advance the required payment. If such payments are not made, the Arbitrator may order the suspension or termination of the proceedings. If no Arbitrator has yet been appointed, the Administrator may suspend the proceedings.

A fee of $300.00 payable by a Party causing a postponement of any Hearing scheduled before an Arbitrator. If the request is made jointly by the Parties, this fee will be divided equally among the Parties. No fee shall be due if the Arbitrator postpones the Hearing on his or her own initiative.

The filing and case management fees are non-refundable. Any professional fees deposited by the Parties shall be fully refunded provided a proper notice of cancellation or postponement is received by the Case Administrator at least fourteen (14) calendar day prior to the first day of the scheduled Hearing. If a notice of cancellation or postponement is received within fourteen (14) calendar day of the first day of a scheduled Hearing, a refund of Hearing fees shall be made only if the Arbitrator is able to schedule another Hearing for that date. Any other fees or expenses shall be refunded in accordance with the terms under which they were incurred.

BY: _____ BY: _____ By: _____
DATED: 3/1/98 Jeff Yager ("Yage") DATED: 3/1/98 Tim Foley ("FLy") Dated: _____ Neil Booth
FOR: D&B Enterprises Inc. + InterNet Services Corp FOR: _____ For: _____
By: _____ By: _____ By: _____
Dated: 3/1/98 Tim Stewart ("Stewart") Dated: 3/1/98 Bill Chambers ("Bram") Date: 3/1/98 Steve Woods (Nitro)
For: _____ For: _____ For: _____
By: _____
Dated: _____ Paul Braun ("Braun") -2-
For: _____

post-Hearing time) at the rate of $1450.00 per increment. Additional pre-Hearing or post-Hearing services will be billed in 1 hour increments at the rate of $300.00 per hour.

The Hearing fees described above do not cover the rental of Hearing rooms for Arbitrations that are conducted at non-JAMS/ENDISPUTE offices or where a fee is assessed to JAMS/ENDISPUTE. All costs relating to the rental of any facilities shall be divided equally among the Parties and will be billed upon scheduling. If the Hearing is rescheduled or canceled, any additional fees or refunds will be assessed equally among the Parties.

Unless otherwise agreed by the Parties, the expenses of witnesses shall be borne by the Party calling such witnesses. All expenses of the arbitration, including required travel and accommodations, travel time when applicable, and other expenses of the Arbitrator, Case Administrator representatives, and any costs relating to witnesses or any other proof produced at the direction of the Arbitrator, shall be borne as directed by the Arbitrator in the award.

The Case Administrator shall estimate the fees required for the Arbitration. As directed by the Case Administrator, the Parties shall deposit such sums of money necessary to cover the expenses of the Arbitration. The Case Administrator shall also have the authority to require a deposit for any necessary additional expenses related to the Arbitration. The Case Administrator shall apply the deposits as directed, and shall return any unexpended balance to the appropriate Party in a timely fashion.

If the professional or administrative fees have not been paid in full, the Case Administrator may so inform the Parties in order that one of them may advance the required payment. If such payments are not made, the Arbitrator may order the suspension or termination of the proceedings. If no Arbitrator has yet been appointed, the Administrator may suspend the proceedings.

A fee of $300.00 payable by a Party causing a postponement of any Hearing scheduled before an Arbitrator. If the request is made jointly by the Parties, this fee will be divided equally among the Parties. No fee shall be due if the Arbitrator postpones the Hearing on his or her own initiative.

The filing and case management fees are non-refundable. Any professional fees deposited by the Parties shall be fully refunded provided a proper notice of cancellation or postponement is received by the Case Administrator at least fourteen (14) calendar day prior to the first day of the scheduled Hearing. If a notice of cancellation or postponement is received within fourteen (14) calendar day of the first day of a scheduled Hearing, a refund of Hearing fees shall be made only if the Arbitrator is able to schedule another Hearing for that date. Any other fees or expenses shall be refunded in accordance with the terms under which they were incurred.

BY: _____ BY: _____ BY: _____
DATED: 3/1/98 DATED: 3/1/98 DATED: _____
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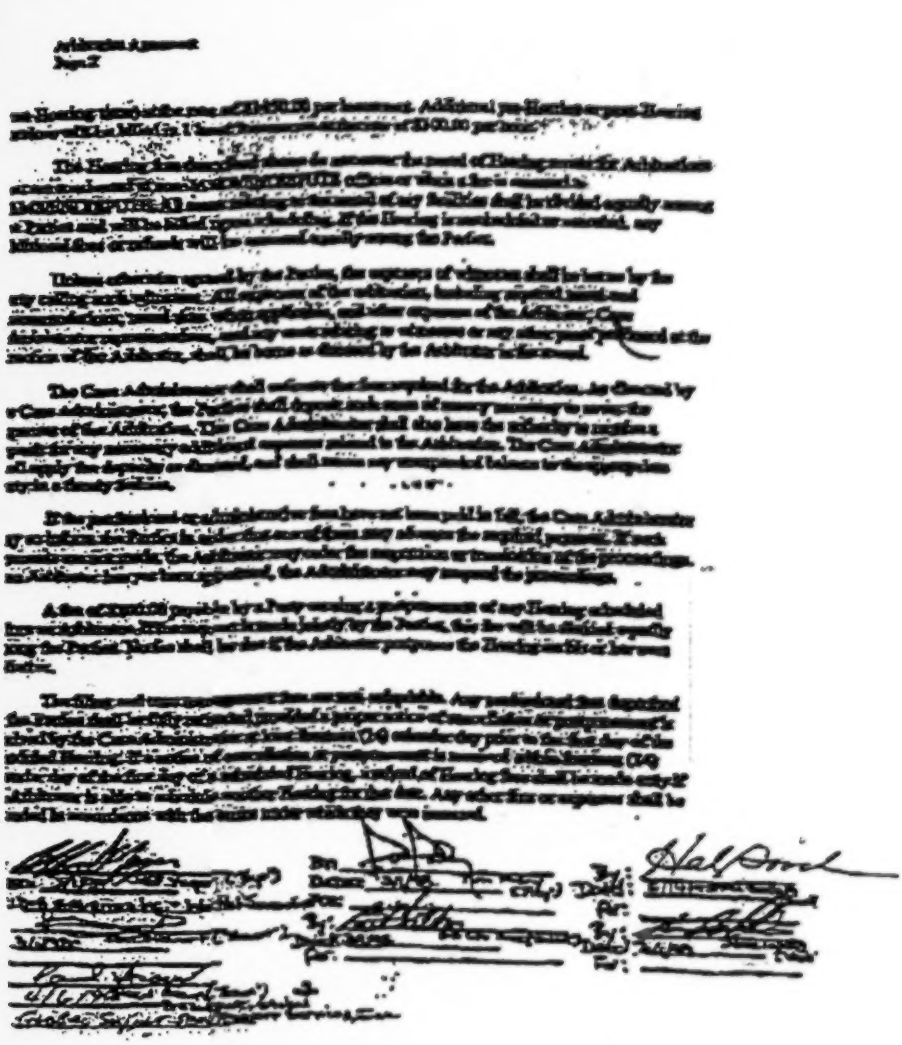
DATED: 3/1/98 DATED: 3/1/98 DATED: 3/4/98
FOR: _____ FOR: _____ FOR: _____
BY: _____
DATED: 4/6/98
FOR: _____



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1007898DD
Inc Stewart And Assoc
177 Us Hwy 1 Ste 313
Tequesta, FL 33469

ACKNOWLEDGEMENT OF DISTRIBUTOR CHANGES

2109791

SIGNATURE(S) REQUIRED

I HAVE READ AND AGREE TO ABIDE BY THE AGREEMENT STATED BELOW.

YOUR SIGNATURE	DATE	BUSINESS SIGNATURE (INCLUDING TITLE)	DATE
[signature]	10/7/97		

I agree to conduct my business according to the Amway Code of Ethics and Rules of Conduct, as they are amended and published from time to time in official Amway literature. I will also comply with all sales tax agreements and their rules and procedures between Amway Corporation and various cities, states, and municipalities. I agree that this authorization does NOT make me an employee, agent or legal representative of Amway Corporation, my sponsor, or any Direct Distributor.

I further promise that I will not sell any Business products that I have read the Distributor Responsibility Statement, which is set out in both the Start Smart Guide and the Merchandising Manual (04-11), and agree to make no representations about such products which are not sanctioned in official Amway literature. I further agree that, with respect to any services performed by me for Amway, I will not be treated as an employee with respect to such services for federal, state, or local tax purposes.

BUSINESS SUPPORT MATERIALS

I understand that Business Support Materials ("BSM") such as books, magazines, audio and videotapes, support tools, or tickets to motivational or business-building seminars and rallies may be available for purchase. I understand that the purchase of such products and services is always optional. The decision to purchase any BSM is entirely up to me. In making this decision, I will use my own good judgement as to what is best for my independent Amway business. Some distributors earn income from the sale of BSM apart from their earnings as Amway distributors. I acknowledge that I have received and read a copy of the Business Support Materials Arbitration Agreement. If I decide to purchase BSM, I understand I should execute the Agreement to Arbitrate attached thereto.

AGREEMENT TO ARBITRATE

I agree that I will give notice in writing of any claim or dispute arising out of or relating to my Amway distributorship, or the Amway Sales and Marketing Plan or Rules of Conduct to the other party or parties, specifying the basis for my claim and the amount claimed or relief sought. I will then try in good faith to resolve the dispute using the Amway Conciliation and Enforcement Procedures contained in the Rules of Conduct for Amway Distributors.

If the claim or dispute is not resolved to my satisfaction within 90 days, or after the Amway conciliation process is complete, whichever is later, I agree to submit any remaining claim or dispute arising out of or relating to my Amway distributorship, the Amway Sales and Marketing Plan, or the Amway Rules of Conduct including any claim against another Amway distributor, or any such distributor's officers, directors, agents or employees, or against Amway Corporation, or any of its officers, directors, agents or employees to binding arbitration in accordance with the Amway Arbitration rules, which are set forth in the Amway Business Compendium. The arbitration award shall be final and binding and judgment thereon may be entered by any court of competent jurisdiction. Demand for arbitration shall be made within two years after the issue has arisen, but in no event after the date when the institution of legal proceedings would have been barred by the applicable statute of limitations. I acknowledge that this Agreement evidences a transaction involving interstate commerce. The United States Arbitration Act shall govern the interpretation, enforcement, and proceedings pursuant to the arbitration provisions.

I agree that if I become involved in a claim or dispute under the Amway conciliation process or the Amway Arbitration Rules, I will not disclose to any other person not directly involved in the conciliation or arbitration process (a) the substance of, or basis for, the claim; (b) the content of any testimony or other evidence presented at an arbitration hearing or obtained through discovery; or (c) the terms or amount of any arbitration award.

DISTRIBUTOR INFORMATION

In order to improve the communications between Distributors and their upline organization beyond their immediate Direct Distributor, your name, address(es), telephone number(s), business status, and sponsor name will be shared with your upline organization. If you don't want this information shared with your upline organization, please check this box. ☒ This information is always shared with your immediate Direct Distributor.

Please revise your records to reflect my choices:

	Yes	No	1998 Fee
1998 ITC Fee	☑		$31.00
A.D.A.	☑	☐	2.00
ADBA	☑	☐	2.00

Please sign and return to Amway by October 3, 1997. Your credit card will be billed in October.

APPENDIX M

The Rules of Conduct

Arbitration Rules

11.5.1. Applicable Rules of Arbitration.

The parties shall be deemed to have made these Rules a part of their Arbitration agreement whenever they have provided for Arbitration under the Corporation's Arbitration Rules ("Rules"). If a party establishes that an adverse material inconsistency exists between an Arbitration agreement and these Rules, the Arbitrator shall apply these Rules; provided, however, that nothing in these Rules shall be construed in any way that limits the Corporation's pre-existing rights to administer, modify or enforce the Independent Business Ownership Plan, the Rules of Conduct or any other Rule or contract relating to an Independent Business.

The Rules in effect on the date of the commencement of an Arbitration will apply to that Arbitration. These Rules shall be amended only by mutual agreement between the Corporation and the IBOAI Board.

11.5.4. Interpretation of Rules and Jurisdictional Challenges

Once appointed, the Arbitrator will resolve disputes about the interpretation and applicability of these Rules, including disputes relating to the duties of the Arbitrator and the conduct of the Arbitration Hearing. The resolution of the issue by the Arbitrator is final.

Jurisdictional and arbitrability disputes, including disputes over the existence, validity, interpretation or scope of the agreement under which Arbitration is sought, may be submitted to and ruled on by the Arbitrator, unless the relevant law requires that a court make such determinations. The Arbitrator has the authority to determine jurisdiction and arbitrability prior to conducting a full hearing on the merits.

Disputes arising before the appointment of the Arbitrator will be resolved by the Case Administrator, but only those disputes relating to jurisdiction and the location and conduct of the Hearing are subject to subsequent review by the Arbitrator. All other procedures shall be interpreted and applied by the Case Administrator.

The Arbitrator upon good cause shown, or at his/her own discretion only when necessary to facilitate the Arbitration, may extend any deadlines stated in these rules, except the time for rendering the Award.

11.5.5. Administrator of the Arbitration

When parties agree to arbitrate under the Arbitration Rules, they thereby authorize Endispute, Inc., d/b/a J.A.M.S/ Endispute, or its successor (hereinafter "Administrator") to administer the Arbitration. The authority and duties of the Administrator are prescribed in these Rules, and may be carried out through such of the Administrator's representatives as it may direct.

APPENDIX N

AAA Commercial Arbitration Rules

R-7. Jurisdiction

(a) The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement.

(b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

(c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

APPENDIX O

JAMS Comprehensive Arbitration Rules and Procedures

Rule 11. Interpretation of Rules and Jurisdictional Challenges

(a) Once appointed, the Arbitrator shall resolve disputes about the interpretation and applicability of these Rules and conduct of the Arbitration Hearing. The resolution of the issue by the Arbitrator shall be final.

(b) Whenever in these Rules a matter is to be determined by "JAMS" (such as in Rules 6, 11(d), 15(d), (f) or (g), 24(i) or 31(e)), such determination shall be made in accordance with JAMS administrative procedures.

(c) Jurisdictional and arbitrability disputes, including disputes over the existence, validity, interpretation or scope of the agreement under which Arbitration is sought, and who are proper Parties to the Arbitration, shall be submitted to and ruled on by the Arbitrator. The Arbitrator has the authority to determine jurisdiction and arbitrability issues as a preliminary matter.

(d) Disputes concerning the appointment of the Arbitrator and the venue of the Arbitration, if that determination is relevant to the selection of the Arbitrator, shall be resolved by JAMS.

(e) The Arbitrator may upon a showing of good cause or sua sponte, when necessary to facilitate the Arbitration, extend any deadlines established in these Rules, provided that the time for rendering the Award may only be altered in accordance with Rules 22(i) or 24.